131
137-310

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~662~~ ~~372~~ 78

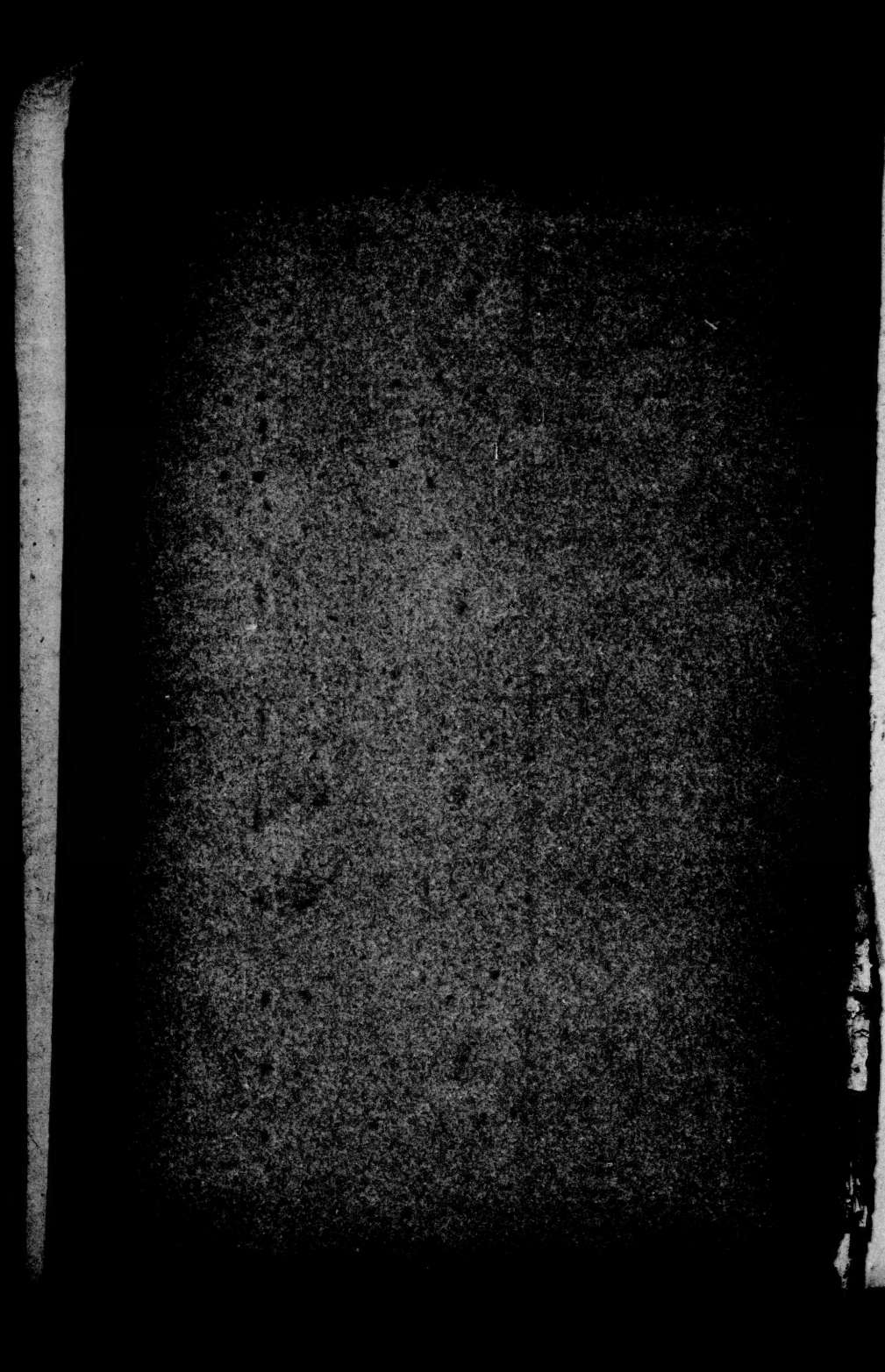
CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER AND ADOLPH WILLIAM VON KESSLER, PLAINTIFFS IN ERROR,

vs.

EDWARD L. HEDDEN, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 15, 1887.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 662.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER AND ADOLPH WILLIAM VON KESSLER PLAINTIFFS IN ERROR,

vs.

EDWARD L. HEDDEN, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	2
Transcript from State court	4	2
Summons	4	2
Complaint	5	3
Notice of appearance and demand	9	4
Bill of particulars	10	5
Petition to remove cause	11	6
Certiorari	13	6
Answers	15	7
Order severing actions	19	8
Minutes of trial	22	9
Judgment	24	10
Bill of exceptions	27	10
Evidence for plaintiff	28	10
General regulations under customs and navigation laws	29	11
Instructions to customs officers July 1, 1885 (Doc. No. 712)	64	29
Testimony of Harry Robinson	74	33
Exhibit 1—Letter of Auffmordt & Co. to collector, March 2, 1886	75	34
Testimony of John V. Van Arsdale	78	35

JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 9, 1888.

	Original.	Print.
Exhibit No. 2—Protest and appeal, April 27, 1886	79	35
No. 3— " " April 29, 1886	82	38
Testimony of George V. Brower	84	43
James Crawford McCreery	86	44
William A. Jones	93	47
James Crawford McCreary (recalled)	99	51
Classification of employees at the civil service customs ports	101	52
Testimony of Harry Robinson (recalled)	102	52
William Kent	110	57
Exhibit No. 14—Report of silk expert on invoice No. 218, Feb. 25, 1886	116	60
Testimony of Harry Robinson (recalled)	120	61
Exhibit No. 15—Invoice	121	61
Declaration	129	68
Consular certificate	131	69
Exhibit No. 5—Re-appraisement	132	69
No. 4—Oath of J. C. McCreery	135	71
No. 16—(Not set out)	136	71
Offer of other protest, &c., discussion as to admission of same	137	71
Testimony of Hans Wehrli	146	76
Opinion of the court	147	76
Plaintiff's requests	153	79
Assignment of errors	158	80
Joinder in error	162	81
Consent and order as to deposit in lieu of bond	164	82
Citation	166	82
Proof of service of citation	167	83

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, plaintiffs, and Edward L. Hedden, collector of the port of New York, defendant, a manifest error hath happened, to the great damage of the said Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-seven, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 5th day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed, and security by deposit with the clerk having been given, this writ of error is a supersedeas.

Dated August 5th, 1887.

E. HENRY LACOMBE.

2 [Endorsed:] U. S. Supreme Court. Clement A. Auffmordt *et al.*, plaintiff in error, against Edward L. Hedden, collector of the port of New York, defendant in error. Writ of error. 1.45 ch. Tremain & Tyler, att'ys for pl'ffs in error, 167 Broadway, New York city.

A copy of the within paper has been this day received at this office.

Aug. 8, 1887.

STEPHEN A. WALKER,
U. S. Attorney.

Service of the within writ of error is hereby acknowledged in behalf of the defendant in error.

Dated August —, 1887.

—— ——.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the
3 second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to one hundred and sixty-seven, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Clement A. Auffmordt, John F. Degener, William Degener, and Adolph Von Kessler, plaintiffs in error, against Edward L. Hedden, collector of the port of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twelfth day of August, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

4 *Copy Summons.*

New York Superior Court.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, and ADOLPH WILLIAM VON KESSLER, Plaintiffs,

against

EDWARD L. HEDDEN, Collector of the Port of New York.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Aug. 3, 1886.

TREMAIN & TYLER,
Plaintiffs' Attorneys.

Office and post-office address: 167 Broadway, New York.

5 New York Superior Court.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, and ADOLPH WILLIAM VON KESSLER

against

EDWARD L. HEDDEN, Collector of the Port of New York.

The above-named plaintiffs, for complaint in this action, state:

I. That the defendant during the times hereinafter mentioned was collector of the customs of the United States at the port of New York, and that the plaintiffs during said times were copartners in trade, doing business in New York and elsewhere under the firm name of C. A. Auffmordt & Co., and in said business imported and entered at the port of New York certain merchandise at the times and by the vessels specified in the plaintiffs' bill of particu-
6 lars, which is hereby made part of this complaint.

II. That the defendant, as such collector, exacted from plaintiffs as and for duties on said merchandise the sums specified in said bill of particulars, to wit, the sum of three thousand eight hundred and fifty-nine $\frac{59}{100}$ dollars ($3,859$\frac{59}{100}$) in excess of the amount required by law, and which said excessive sum the plaintiffs, on or about the dates specified in the said bill of particulars, and in order to obtain possession of said goods, were compelled to pay and did pay to the defendant.

III. That plaintiffs filed with the said defendant due and timely protests in writing upon each and every entry of said goods against the decision exacting said duties, setting forth distinctly and
7 specifically the grounds of objection thereto, and also as above stated.

IV. That plaintiffs have made due and timely appeal in each case to the Secretary of the Treasury, whose decision in each appeal has either been rendered within ninety days previous to the beginning of this suit or has been delayed more than ninety days from the date of such appeal on each and every entry.

V. That the said bill of particulars states for each importation separately the date of entry at the custom-house, the precise amount of duty said to have been exacted in excess, the date of payment of said duty, and the filing of said protests; of the appeals to the Secretary of the Treasury and his decision thereon, if any, to-
8 gether with the other particulars required by law.

VI. That the sums so exacted as aforesaid have not been repaid to the plaintiffs and are still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for the sum of three thousand eight hundred and fifty-nine $\frac{59}{100}$ dollars ($3,859$\frac{59}{100}$), with interest thereon from the several dates of payment as they appear on said bill of particulars, together with the costs and disbursements of this action.

TREMAIN & TYLER,
Plaintiffs' Attorneys.

Office and P. O. address: 167 Broadway, New York city.

9 *Notice of Appearance and Demand.*

N. Y. Superior Court.

CLEMENT AUFFMORDT & O'RS *versus* E. L. HEDDEN.

You will please take notice that I am restrained by and appear as attorney for the defendant in this action and demand service of a bill of particulars of the plaintiffs' claims therein and a copy of all papers in this action upon me, at my office, in the United States court and post-office building in the city of New York.

New York, Aug. 20, 1886.

STEPHEN A. WALKER,
United States Attorney, Attorney for Def't.

To Tremain and Tyler, attorney- for pl'ff-.

Copy.

Bill of Particulars of Merchandise Imported by C. A. Auffmordt & Co.

N. Y. Superior Court.

CLEMENT A. AUFFMORDT & Others
vs.
EDWARD L. HEDDEN. } 11132.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
Hat materials, manufactures of silk and of silk and cotton and miscellaneous charges.	Liverpool....	Britannic.....	Jan'y 23, 1886.....	Feb'y 9, 1886	$724 20	Feb'y 9, 1886	Ap'l 10, 1886	Ap'l 10, 1886	
	Bremen.....	Main.....	Feb'y 24, 1886.....	M'ch 13, 1886	533 00	M'ch 13, 1886	Ap'l 29, 1886	Ap'l 29, 1886	
	Liverpool....	Germanic.....	M'ch 6, 1886.....	M'ch 22, 1886	1,051 00	M'ch 22, 1886	Ap'l 20, 1886	Ap'l 20, 1886	
	Havre.....	Normandie.....	M'ch 15–17, 1886....	M'ch 30, 1886	1,551 00	M'ch 31, 1886	Ap'l 29, 1886	Ap'l 29, 1886	

TREMAIN & TYLER, *Pl'ffs' Att'ys.*

EDWARD L. HEDDEN, COLLECTOR, &c.

11 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

To the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit:

Edward L. Hedden, petitioner and affiant, respectfully showeth that he was, prior to the commencement of the suit hereinafter referred to, collector of the customs for the port and district of the city of New York, duly appointed according to law, and that on or about the 3d day of Aug., 1886, a suit was commenced against him by Clement A. Auffmordt, John F. Degener, Wm. Degener, & Adolph W. Von Kessler in the superior court of the city of New York for or on account of acts done by him under the revenue laws of the United States, and as such collector, and that he has been served with process in said suit in said southern district, and that no trial has been had in said cause.

He therefore prays that, in pursuance of the act of Congress in such case made and provided, the said cause so commenced in the said superior court may be removed therefrom and entered on the docket of this honorable court and thereafter proceeded in as a cause originally commenced in this court.

And he will ever pray, etc.

And, being duly sworn, deposes and says that the matters hereinbefore set forth are true to the best of his knowledge, information, and belief.

E. L. HEDDEN.

Sworn to before me this 24th day of August, A. D. 1886.

GEO. HILLEN,
Notary Public — County, N. Y.

I certify that as counsel for the petitioner I have examined into the proceedings against him, and have carefully inquired into all the matters set forth in the within petition and affidavit, and that I believe the same to be true.

New York, Aug. 26, 1886.

STEPHEN A. WALKER,
U. S. Attorney, Counsellor of the said Circuit Court.

12 [Endorsed:] U. S. circuit court. Clement A. Auffmordt & o'rs *vs.* Edward L. Hedden, collector of customs at the port of New York. Petition to remove cause. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Aug. 27, 1886. Timothy Griffith, clerk.

13 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the

second circuit, shall be certified of a certain cause commenced before you against E. L. Hedden, defendant, by Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 31st day of August, 1886, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right out to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 27th day of August, in the year one thousand eight hundred and eighty-six.

[L. S.] TIMOTHY GRIFFITH, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

14 [Endorsed:] U. S. circuit court. Clement A. Auffmordt & *als. versus* E. L. Hedden. Certiorari, Stephen A. Walker, United States attorney, attorney for defendant. I hereby depute R. L. Burnett to serve the within writ. Dated N. Y., Aug. 27, 1886. M. T. McMahon, U. S. marshal. U. S. circuit c't. F'd Aug. 3d, 1886. Timothy Griffith, clerk.

I have this day personally served upon the clerk of the superior court of the city of New York a duplicate of the within writ, at the same time showing the original.

Dated N. Y., Aug. 28, 1886.

M. T. McMAHON, *U. S. Marshal,*
By B. L. BURNETT, *Dep. Mar.*

15 Circuit Court of the United States for the Southern District of New York.

CLEMENT A. AUFFMORDT & *al.*
vs.
EDWARD L. HEDDEN. } 11122.

To defendant answers to the complaint as follows:

He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint, and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with the defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or i-formation sufficient to form a belief as to whether the goods alleged in the
16 complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

VI. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from plaintiffs to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

17 Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for Def't.

18 [Endorsed:] U. S. circuit court, southern district of of New York. Clement C. Auffmordt & *al. vs.* Edward L. Hedden, collector, etc. Answer. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Nov. 19, 1886. Timothy Griffith, clerk.

19 At a stated term of the U. S. circuit court for the southern district of New York, held at the court-rooms, New York city, on the 23d day of November, 1886.

Present: Hon. Hoyt H. Wheeler, U. S. district judge, sitting as circuit judge.

CLEMENT A. AUFFMORDT & Others
vs.
EDWARD L. HEDDEN. } No. 11132.

It appearing on the call of this cause for trial that this action is, without prejudice to the parties and with advantage towards its final determination, severable into two causes of action, each capable of being independently tried, and plaintiffs applying for leave to

separate said action into two causes of action and to sever
20 the action, as by law in such cases provided, now, on reading and filing the affidavit of one of plaintiffs' attorneys and on hearing Mr. Tremain for the plaintiffs and Mr. Henry C. Platt, representing the U. S. district attorney, for the defendant, it is ordered that this action be severed as follows: That the present action stand for trial upon all questions of law and fact involved in the one importation specified in the bill of particulars by the vessels Main, of March 13, 1886, except concerning the rates of duty affecting plaintiffs' claims on said specified importation by the Main, and that all other issues upon the four importations specified in the bill of particulars, including the rates of duty affecting all of said four
21 importations, be, and the same are hereby, severed and continued in another and separate action, wherein the record to date hereof shall be the same as the record in this action, and wherein plaintiffs may have leave to serve an amended complaint stating said separated cause of action if plaintiffs so desire; this action to be known, as originally entitled, by the No. 11132, and the action severed herefrom as aforesaid may be known as Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, plaintiffs, against Edward L. Hedden, collector, defendant, 11132*a*.

(Signed.) HOYT H. WHEELER.

A copy.

[L. S.] (S'g'd) TIMOTHY GRIFFITH, *Clerk.*

22 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the tenth day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Hoyt H. Wheeler, judge.

CLEMENT A. AUFFMORDT & Oth's
vs.
EDWARD L. HEDDEN. } 11132.

Now come the plaintiffs, by Tremain and Tyler, their attorneys, and move the trial of this cause. Likewise comes the defendant, by Henry C. Platt, Esq., ass't U. S. attorney, his attorney; thereupon a jury is empanneled and the cause proceeds to trial. After hearing the evidence of the parties and the argument of counsel the court directs the jury to find a verdict for the plaintiffs in the amount of ten dollars.

Thereupon the jury render a verdict, whereby they find
23 for the plaintiffs in the amount of ten dollars.

It is ordered that a certificate of probable *cause* be entered herein, and that defendant have a stay of proceedings on said verdict for sixty days.

TIMOTHY GRIFFITH, *Clerk.*

24 *Judgment.*

United States Circuit Court, Southern District of New York.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, and ADOLPH WILLIAM VON KESSLER
against
EDWARD L. HEDDEN, Collector of the Port of New York. } 11132.

This action having been severed by an order dated the twenty-third day of November, 1886, and the issues upon all questions of law and fact involved in the one importation specified in the bill of particulars by the vessel Main of March 13, 1886, except the issues concerning the rates of duty affecting plaintiffs' claim in said importation by the Main, having come on for trial at the October term of this court, 1886, before Mr. Justice Hoyt H. Wheeler, sitting as circuit judge, and a jury duly empanneled and sworn, and a verdict having been rendered for the plaintiffs for the sum of ten dollars ($10.00), and plaintiffs' costs having been duly taxed at the sum of sixty dollars and thirty-five cents ($60.35), now, on motion of Freeman and Tyler, plaintiffs' attorneys; it is adjudged that
25 the plaintiffs, Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, do recover of the defendant, Edward L. Hedden, the sum of ten dollars ($10.00) as aforesaid, together with the sum of eighty cents (80c.) interest and sixty dollars and thirty-five cents ($60.35) costs, amounting in the aggregate to seventy-one dollars and fifteen cents ($71.15), for which sum judgment is hereby docketed.

Judgment signed this 28th day of July, 1887.

JOHN A. SHIELDS, *Deputy Clerk.*

26 [Endorsed:] United States circuit court, southern dist. N. Y. Clement A. Auffmordt, John F. Degener, William Degener, and Adolph D. Von Kessler *vs.* Edward L. Hedden, collector of the port of N. Y. Judgment roll. Tremain and Tyler, pl'ffs' att'ys, 167 Broadway, New York. U. S. circuit court. Filed July 28, 1887, 3.05 p. m. Timothy Griffith, clerk.

27 *Plaintiffs' Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, and ADOLPH WILLIAM VON KESSLER
against
EDWARD L. HEDDEN, as Collector of the Port of New York. } 11132.

The issues joined in this action came on for trial at the October term, 1886, of this court at a session thereof held at the United States court-rooms, New York, before Hon. Hoyt H. Wheeler, judge, and a jury, on the 10th and 11th days of December, 1886, plaintiff- being

represented by *his* counsel, Tremain & Tyler, Esqrs., and Alexander P. Ketchum, Esq., and the defendant by District Attorney Stephen A. Walker, Esq., and his assistant, H. C. Platt, Esq. And at said trial divers exceptions were taken by plaintiffs to the rulings of said court in the exclusion of testimony and in instructions and refusals to instruct the jury, which appear more fully in the following account of the proceedings of said trial.

28 The jury being empanneled and sworn, plaintiffs' counsel offered and read in evidence the following parts of the General Regulations under the Customs and Navigation Laws, published by the Treasury Department in 1884, to wit, chapter 3, part 3, articles 447 to and including article 506, which is as follows:

29 CHAPTER III.

Appraisement of Merchandise.

Mode of procedure.

Art. 447. At ports where appraisers are appointed in pursuance of law appraisements will be made by them. R. S., 2902. Where there are no United States appraisers appraisement will be made by the collector and naval officer, or, where there is no naval officer, by the collector. Their return as to the value of the merchandise is final and conclusive, unless the importer requests a reappraisement within twenty-four hours. See reappraisements.

Art. 448. The collector will designate on the invoice at least one package of every invoice, and one package at least of every ten packages of imported merchandise, and a greater number should it be deemed necessary by himself, or the naval officer, or either of the appraisers, and order the same to the public store to be opened, examined, and appraised. This examination can in no case be dispensed with. R. S., 2901. As to the port of New York, see R. S., 2959.

Art. 449. The collector having designated on the invoice the packages for examination and appraisement, and marked distinctly thereon the rate at which duties have been assessed on the several articles therein specified, will, in every case, transmit the invoice by an official messenger to the appraisers and order the packages so designated to the public store for such examination and appraisement.

30 If the articles are bulky he will direct their examination on the wharf or other safe and suitable place to be designated by him for that purpose. 10 Wallace, 449.

If the merchandise be such as by commercial usage is bought and sold by samples, or where by such usage the character and quality of the merchandise are so determined, the appraisement may in such cases be made by samples, due care being taken that they are properly and fairly selected from the packages designated in the invoice by the collector and identified as such. 1 Clifford, 492.

Matches will be examined at the appraiser's store. S. 6081.

Art. 450. In no case can the examination of imported merchan-

dise be made at the residence of the importer, or at any other place not contemplated by the foregoing article, unless by special permission from the collector of customs, in which the appraiser concurs. Such permission will be given by the collector in person only, or, in his absence, by his special deputy, and not otherwise than in exceptional and extraordinary cases, as, for example, when articles are of a very fragile character or are imported for the personal use of the importer and not as merchandise, or when they might be exposed to injury by being opened, examined, and repacked at the appraiser's store.

Before granting such permission the collector will require the importer to deposit with him an amount sufficient to cover the expense,
if any, that may be incurred in the examination of the mer-
31 chandise at the place designated. Circular, December 15, 1881.

Art. 451. A thorough examination must then be made, under the direction of the appraisers, in connection with the specifications and description in the invoice, to ascertain whether the merchandise corresponds in quantity and description with the invoice and whether the value declared on the entry corresponds with the requirements of law.

Art. 452. If it be found on such examination that the merchandise in the package varies in quantity or in character from the specifications in the invoice or that the merchandise is invoiced below its foreign market value it is the duty of the appraisers to notify the collector, in writing, of the facts, and, if necessary, request that the remaining packages contained in the invoice be submitted for their examination in detail.

If such remaining packages have been delivered to the importer under bond the collector will forthwith make requisition upon him in the following form:

Form No. 100.

Request to Importer to Deliver Goods to Storekeeper at Appraisers' Store.

CUSTOM-HOUSE, ——,
COLLECTOR'S OFFICE, —— —, 18—.

SIR: You are hereby required to deliver to the storekeeper at the United States appraiser's office, No. — —— street, the following-described merchandise, viz., —, imported by you in the ——, —— ——, master, from ——, and entered at this office on the — day of ——, 18—, in accordance with the terms of the bond executed by you on entry of the same, under section 2899 of the Revised Statutes of the United States.

—— ——, *Collector.*

32 This requisition will be delivered personally to the importer or be left at his place of business by a messenger, who will certify the delivery and the time thereof on the copy of the requisition recorded in the collector's office.

Art. 453. If a package be found on examination to contain any article not specified in the invoice or prohibited by law the appraisers will make a special report, in writing, to the collector, with an expression of their opinion whether or not the omission was made or the forbidden article introduced with fraudulent intent on the part of the shipper, owner, or agent.

Art. 454. If the merchandise be found to correspond in quantity, character, and value with that described in the invoice and declared on entry the appraisers will report accordingly to the collector, in writing, duly signed by them; which report should be written on the invoice if practicable, and, if not, on a separate paper permanently attached to the invoice.

The report or return of the appraisers must describe the character of the merchandise as nearly as practicable in the terms of the tariff, and should state, for the information of the collector and naval officer, under what classification, in their opinion, it falls. It should be forwarded without unnecessary delay and not be held to await the result of application to the department. 8258 c.

Art. 455. The certificate of any one of the assistant appraisers at the port is to be deemed and taken to be the legal appraisement of imported merchandise required to be made by such appraisers. R. S., 2950.

33 Art. 456. If the collector shall deem any appraisement too low he has power to order a reappraisement, either by the principal appraisers or by three merchants, citizens of the United States, designated by him for the purpose, who are subject to a penalty of fifty dollars ($50) and costs for declining or neglecting to serve. R. S., 2529, 2609, 2610, and 2945; Iasigi *vs.* Collector, 1 Wallace, 375.

Art. 457. At ports where there are no United States appraisers the collector and naval officer or, where there is no naval officer, the collector must endorse on the invoice itself or on a separate paper permanently attached thereto a statement of the results of their appraisement, in writing, signed by him or them. R. S., 2946 and 2950; S., 1000.

Art. 458. The revenue laws require that the examination and appraisement of imported merchandise shall take place at the first port of entry, at which port, also, the actual quantity must be ascertained by weighing, gauging, or measuring, as the case may be, and the amount of duties ascertained and paid or secured to be paid, except when entry is made at the first port of arrival for immediate transportation in bond without appraisement.

Art. 459. It is lawful for the appraisers or the collector and naval officer, as the case may be, to call before them and examine, upon oath or affirmation, any owner, importer, consignee, or other person touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of merchandise imported, and to require the production, on oath or affirma-

34 tion to the collector or to any permanent appraiser, of any letters, accounts, or invoices in his possession relating to the

same, for which purpose they are authorized to administer oaths or affirmations. Such persons are not entitled to compensation. S., 335.

And all testimony in writing or depositions thus taken will be filed in the collector's office, preserved for future use or reference, and transmitted to the Secretary of the Treasury whenever he may require the same.

Art. 460. In making advances on invoices the appraisers will make the addition to or advance upon the value declared on entry, in the currency in which the invoice is made out, in a specific sum and not by percentage and in the weight, gauge, or measure expressed in the invoice, but in no case will an average valuation be made.

Art. 461. All communications and papers, whether invoices, appraisement orders, damage warrants, or others, passing between the custom-house proper and the appraisers must be transmitted by an officer of the customs or an official messenger.

All persons, except officers and employees whose duties require them to have access to the places or rooms in the appraisers' department in which merchandise is examined under the laws regulating appraisements, must be excluded therefrom.

Art. 462. The addition made by the appraisers having been first noted on the invoice and certified by them, the invoice will immediately be forwarded to the collector, who will at once give notice of the advance to the importer in the following form:

Form No. 101.

Notice to Importer of Advance in Value upon Appraisement.

CUSTOM-HOUSE, ——,
COLLECTOR'S OFFICE, —— —, 18—.

SIR: A lot of —— entered by you on the ——, per the ——, from ——, has been appraised in accordance with law, and the valuation exceeds by —— the amount declared as the value on entry. If you appeal from this appraisement it will be necessary to do so within twenty-four hours from the receipt hereof.

—— ——, *Collector.*

To —— ——.

Reappraisements.

Art. 463. If the importer be dissatisfied with the appraisement he may, if he has complied with the legal requirements, give notice of such dissatisfaction in writing to the collector. This notice must be given in all cases within twenty-four hours or before the end of the official day after the day on which the collector gave the notice prescribed in the foregoing article, and may be in the following form. R. S., 2930.

Form No. 102.

Importer's Notice to Collector Claiming Reappraisement.

——, ——, 18—.

SIR: As I consider the appraisement made by the United States appraisers too high on ——, imported by —— ——, in the ——, from ——, I have to request that the same may be reappraised pursuant to law with as little delay as your convenience will permit.

—— ——.

—— ——, collector of the customs.

Art. 464. The collector, on receiving such notice, will call on the local appraisers for an appraisement and special report thereof
36 in due form, at the same time notifiying them of the appeal and requiring them to inform him whether additional samples or packages of the merchandise be necessary to secure a full compliance with the law. If such samples or packages be required or the collector deem the examination of an additional number be expedient he will, in case the merchandise has been delivered to the importer, make requisition (form No. 97) upon the importer to return the entire importation.

Report of the Local Appraisers.

Art. 465. The special report of the local appraiser will be in the following form and may be signed by one or more of the appraisers:

Form No. 103.

Appraisers' Report.

PORT OF ——, APPRAISERS' OFFICE, —— —, 18—.

SIR: We have examined ——, imported by —— ——, in the ——, from ——, and do hereby certify that, in our opinion, the actual market value (or wholesale price) of the said goods at the period of the exportation thereof to the United States in the principal markets of the country from which the same were imported into the United States was, and we do therefore appraise the same, as follows:

Marks.	Numbers.	Description of merchandise.	Value.

—— ——.
—— ——,
Appraisers.

To —— ——, collector of the customs.

Merchant Appraisers.

Art. 466. On the receipt of this report the collector will select one discreet and experienced merchant, a citizen of the United
37 States, familiar with the character and value of the goods in question, to be associated with an appraiser at large, if the attendance of such officer be practicable, to examine and appraise the same according to law. R. S., 2930.

The selection of merchant appraisers should not be confined exclusively to those connected with foreign imports, but when the requisite knowledge exists should be extended so as to embrace domestic manufacturers and producers and other citizens acting as merchants, although not dealing in foreign merchandise. S., 6111.

The merchant thus selected will be notified by the collector of his appointment and of the time and place of the re-examination.

The appraiser at large will be notified of the appeal, of the time fixed for reappraisement, and of the name of the merchant appraiser. The importer will be notified of the time and place, but not of the name of the merchant, selected to assist in the reappraisement.

If the attendance of an appraiser at large be impracticable the collector will select an additional merchant, qualified as aforesaid, for the performance of the service.

Art. 467. The notice of the appointment of the merchant appraiser will be in the following form:

Form No. 104.

Appointment of Merchant Appraiser.

CUSTOM-HOUSE, ——,
COLLECTOR'S OFFICE, —— —, 18—.

SIR: You are hereby appointed to appraise —— which has been entered at this port, the importer having requested a new appraisement thereof in accordance with the provisions of the several acts of Congress providing for and regulating the appraisement of
38 imported merchandise, and you are requested to appear at ——, at — o'clock on the — day of ——, 18—, to appraise the said goods pursuant to law.

Before entering upon the duty indicated in the above appointment you will please call at this office to take the requisite oath.

Very respectfully, —— ——, *Collector.*

To —— ——, merchant.

Art. 468. The oath to be taken by the merchant appraiser will be in the following form:

Form No. 105.

Oath of Merchant Appraiser.

I, the undersigned, appointed by the collector of —— to appraise ——, imported per ——, from ——, the importer having

requested a new appraisement thereof in accordance with law, do hereby solemnly swear diligently and faithfully to examine and inspect said lot of —— and truly to report to the best of my knowledge and belief the actual market value or wholesale price thereof at the period of the exportation of the same to the United States in the principal markets of the country from which the same was imported into the United States in conformity with the provisions of the several acts of Congress providing for and regulating the appraisement of imported merchandise.

—— ——.

PORT OF ——.

Sworn to and subscribed before me this — day of ——, 18—.

—— ——, *Collector.*

Samples, &c., to be Sent to Reappraisers.

Art. 469. At the time fixed for reappraisement the collector will send to the appraiser at large and merchant appraiser the invoice or invoices of the merchandise to be examined and appraised. The storekeeper or other officer having charge will deliver to them the samples or packages ordered for examination, and they will proceed to examine and appraise in the manner pointed out by law.

39 The importer or his agent will be allowed to be present and to offer such explanations and statements as may be pertinent to the case.

The valuation having been determined, the appraisers will report the same to the collector.

Art. 470. In case the appraisers do not agree they will make separate reports to the collector, who will decide between them. The collector is, however, not bound by the values fixed in the report of either the merchant appraiser or the general appraiser, but will adopt such value as upon the testimony submitted may seem to him just, and the appraisement thus determined will be final and the duties be assessed accordingly. Appraisers may reconsider, alter, or amend their original reports, although a reappraisement had been demanded and is in progress. Circular, January 9, 1879. R. S., 2608, 2930; S., 4269.

Reappraisement is Final.

Art. 471. An original appraisement unappealed, as well as the decision of the merchant appraisers on appeal, is final and conclusive against the importer. Neither can be impeached except for fraud or material informality.

Importers are precluded by their appeal to merchant appraisers from afterwards alleging any informality in the proceedings of the United States appraisers on the original appraisement.

Questions of valuation only are subjects for reappraisement.

The Secretary of the Treasury has no authority to remit or

40 refund the additional duty, if any, imposed in consequence of a final appraisement in pursuance of law.

Compensation of Merchant Appraisers.

Art. 472. The merchant appraiser is entitled as such to a compensation of five dollars *per diem* while so employed, to be paid by the party taking the appeal. In cases, however, where such party refuses or delays to make the payment the collector is authorized, if claimed by the merchant appraiser, to advance the sum due to said merchant appraiser, such payment to be noted on the entry of the merchandise in question; and no permit thereafter will be issued for the delivery of said merchandise or any part thereof for consumption, transportation, or exportation until the collector be reimbursed by the importer for the advance so made. R. S., 2725; S., 4242; art. 429, Regs. 1874.

Art. 473. In cases of reappraisement under section 2929, Revised Statutes, the local appraiser may submit to the collector the names of suitable merchants, not excluding domestic manufacturers and producers and other citizens acting as merchants (S., 6111), known to be well qualified, to aid the collector in making judicious selection; but the latter need not confine himself to the list made by the appraiser. S., 3809.

Where three merchant appraisers are appointed under section 2929, Revised Statutes, they will be paid by the Government.

Art. 474. Merchants' appraisements should not assume the
41 nature of a judicial inquiry where judgment is rendered in accordance with the preponderance of testimony on either side, but should be conducted as an investigation by experts to ascertain whether the local appraiser has reported the true and proper market value of the merchandise in question. (S., 2655.) Application for copies of proceedings on reappraisements should be made to the general appraiser, who will exercise his discretion in regard to furnishing the same.

Delivery of Goods Pending Reappraisement.

The following rules may be observed as regards the delivery of merchandise pending reappraisement, which may be fully and correctly represented by samples:

First. On delivery the importers shall be required to deposit a sum sufficient to cover the duties on the appraised value, together with any penal duty which may thereby accrue.

Second. The merchant appraiser and the general appraiser shall, prior to the delivery, make a formal examination of the goods sufficient to meet the demands of the law for the purposes of the reappraisement.

Third. Samples or sample packages, as in the judgment of the general appraiser may be necessary, shall be retained pending the final completion of the reappraisement.

Fourth. The certificate of the general appraiser shall be given prior to such delivery consenting to the delivery of the goods less the retained samples.

42 Fifth. The importers shall file a stipulation binding themselves to abide the results of the appraisement the same as if all the goods had been retained.

Sixth. No delivery under the above rules shall be permitted of goods belonging to a class which has been passed upon by a previous reappraisement, whether belonging to the same importer or to another party, and where the local appraiser has advanced the goods to the same or substantially the same sum as was reported in the case involved in the former reappraisement.

Seventh. No delivery under the above rules will be permitted in any case where the value reported by the local appraiser is greater by 20 per cent. or more than the value declared in the entry. S., 3663 and 4459.

Dutiable Value of Imports.

Art. 475. It shall be the duty of the appraisers of the United States and every of them and every person who shall act as such appraiser or of the collector and naval officer, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise at the time of exportation and in the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels, or quantities, and such actual market value or wholesale
43 price of every of them as the case may require. All such merchandise being manufactured of wool or whereof wool shall be a component part which shall be imported into the United States in an unfinished condition shall in every such appraisal be estimated to have been at the time of exportation and place whence the same was imported into the United States of as great value as if the same had been entirely finished. R. S., 2902.

Art. 476. When the duty upon any imports shall be subject to be levied upon the true market value of such imports in the principal markets of the country from which the importation has been made or at the port of exportation the duty shall be estimated and collected upon the value on the day of actual shipment, whenever a bill of lading shall be presented showing the date of shipment and which shall be certified by a certificate of the United States consul, commercial agent, or other legally authorized deputy. R. S., 2904.

Art. 477. In all cases where merchandise subject to ad valorem duty or on which the duties are to be levied upon the value of the square yard, and in all cases where any specific quantity or parcel of such merchandise has been imported into the United States from a country in which the same has not been manufactured or produced, the foreign value shall be appraised and estimated according to the current market value or wholesale price of similar articles at the principal markets of the country of production or manufacture at the period of the exportation of such merchandise to the United States. R. S., 2905.

44 Art. 478. When an ad valorem rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by or directed to be estimated or based upon the value of the square yard or of any specified quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actual market value or wholesale price thereof at the period of the exportation to the United States in the principal markets of the country from which the same has been imported to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed. R. S., 2906.

Art. 479. The appraisers or the collector and naval officer, as the case may be, may call before them and examine upon oath any owner, importer, consignee, or other person touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported, and require the production, on oath to the collector or to any permanent appraiser, of any letters, accounts, or invoices in his possession relating to the same. All testimony in writing or depositions taken by virtue of this section shall be filed in the collector's office and preserved for future use or reference, to be transmitted to the Secretary of the Treasury when he shall require the same. R. S., 2922.

Art. 480. If any person so called shall neglect or refuse to attend, or shall decline to answer, or shall, if required, refuse to an-
45 swer in writing any interrogatories and subscribe his name to his deposition, or to produce such papers when so required by an appraiser or collector and naval officer, he shall be liable to a penalty of one hundred dollars; and if such person be the owner, importer, or consignee the appraisement which the appraisers or collector and naval officer, where there are no legal appraisers, may make of the merchandise shall be final and conclusive. R. S., 2923.

Art. 481. Any person who shall wilfully and corruptly swear falsely on an examination before any appraiser or collector and naval officer shall be deemed guilty of perjury; and if he is the owner, importer, or consignee the merchandise shall be forfeited. R. S., 2924.

Art. 482. Whenever, in the opinion of the Secretary of the Treasury, it may be necessary in order to carry into full effect the laws for the collection of the revenue he may authorize the collector of any district into which merchandise subject to duty may be imported to require the owner, importer, or consignee of such merchandise to give bond in a sum not exceeding the value of such merchandise that he will produce or cause to be produced within a reasonable time, to be fixed by the Secretary, such proof as the Secretary may deem necessary and as is in the power of the owner, importer, or consignee to obtain to enable the collector to ascertain the class or description of manufacture or rate of duty to which such merchandise is justly liable. R. S., 2925.

46 Art. 483. Before any merchandise which may be taken from any wreck shall be admitted to an entry the same shall be appraised, and the same proceedings shall be ordered and exe-

cuted in all cases where a reduction of duties shall be claimed on account of damage which any merchandise shall have sustained in the course of the voyage, and in all cases where the owner, importer, consignee, or agent shall be dissatisfied with such appraisement he shall be entitled to the privileges of appeal as provided for in this title. R. S., 2928.

Art. 484. The Secretary of the Treasury from time to time shall establish such rules and regulations not inconsistent with the laws of the United States to secure a just, faithful, and impartial appraisal of all merchandise imported into the United States, and just and proper entries of such actual market value or wholesale price thereof, and of the square yards, parcels, or other quantities, as the case may require, and of such actual market value or wholesale price of each of them. R. S., 2949.

Art. 485. The certificate of any one of the appraisers of the dutiable value of any imported merchandise required to be appraised shall be deemed to be the appraisement of such merchandise required by law to be made by such appraisers. Where merchandise shall be entered at ports where there are no appraisers the certificate of the revenue officer to whom is committed the estimating and collection of duties of the dutiable value of any merchandise re-
47 quired to be appraised shall be deemed and taken to be the appraisement of such merchandise required by law to be made by such officer. R. S., 2950.

Duties on Charges Abolished.

Art. 486. "Sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States and section fourteen of the act entitled 'An act to amend the customs-revenue laws and to repeal moities,' approved June twenty-second, eighteen hundred and seventy-four, are hereby repealed, and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable: Provided, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same." Act March 3, 1883, § 7.

Appraisement Under Section 7, Act March 3, 1883.

Art. 487. As regards the basis on which ad valorem duties are to be estimated the only change effected by section 7 of the act of 1883 is to exclude from such basis all costs and charges which,
48 under the law as it previously stood, were required to be added to the current or actual market value or wholesale

price of the merchandise in the principal markets of the country whence the same was imported or of the country of production or manufacture, as the case might be. Thus the current or actual market value or wholesale price in those markets which is to be appraised is now made the sole basis for estimating such duties. Circular No. 18, January 18, 1884.

The cost of boxes or coverings with which goods are ordinarily prepared for sale in the foreign market and in which they are usually sold and purchased there (the price paid for the goods, including the box or covering which goes therewith to the purchaser) must be regarded as entering into or as being an element of actual market value of the goods. Section 7 of the act of 1883 does not forbid the inclusion in the dutiable value of merchandise of that which forms a constituent of its actual market value; hence the dutiable value of goods usually prepared for sale as above and thus usually sold in the foreign market is their current or actual market value or wholesale price in such market as enhanced by the preparation thereof for sale in the manner mentioned.

The expense of the usual and customary preparation of silks, velvets, and ribbons for sale in the foreign market necessarily enters into the actual market value of those articles in that market. This being so, and the price paid for the goods in that market including such expense, the latter is not to be estimated separately for "insertion in the dutiable value," nor is any part thereof
49 to be estimated and deducted from the dutiable value.

The current or actual market value or wholesale price of the goods in the condition in which they are usually sold and purchased in the foreign market, and that alone, is required to be ascertained. Such value or price of the goods is now their dutiable value, and the addition to or deduction from the latter of costs or expenses of any kind which necessarily enter into and are included in the former is unwarranted by the existing law. (Opinion Attorney General, Junuary 11, 1884; Circular Treasury Department, January 18, 1884.)

Appraisement under Section 9, *Act March* 3, 1883.

Art. 488. If upon the appraisal of imported goods, wares, and merchandise it shall appear that the true and actual market value and wholesale price thereof as provided by law cannot be ascertained to the satisfaction of the appraiser, whether because such goods, wares, and merchandise be consigned for sale by the manufacturer abroad to his agent in the United States or for any other reason, it shall then be lawful to appraise the same by ascertaining the cost or value of the materials composing such merchandise at the time and place of manufacture, together with the expense of manufacturing, preparing, and putting up such merchandise for shipment, and in no case shall the value of such goods, wares, and merchandise be appraised at less than the total cost or value thus ascertained. Act March 3, 1883, § 9.

50 Section 9 of the act of March 3, 1883, cited above, in nowise changes or modifies the requirements of the Revised Stat-

utes as to the duty of manufacturers, owners, or agents in making their delarations to invoices under section 2854, Revised Statutes, or as to the verification by the oath of the owner under section 2845, as amended. Both sections require a statement that the invoice contains a true and faithful account of the merchandise at its fair market value at the time and place when and where the same was procured or manufactured. The method adopted in section 9 should not be resorted to except in cases where the true and actual market value and wholesale price cannot otherwise be ascertained to the satisfaction of the appraiser, a condition which can but rarely occur.

When the appraiser is compelled to adopt this mode of appraisal he may add to the items therein enumerated whatever he deems proper to make the true and actual market value, the only restriction upon his action being that "in no case shall the value of such goods, wares, and merchandise be appraised at less than the total cost or value thus ascertained."

Dutiable Value in Particular Cases.

Art. 489. Whenever articles composed wholly or in part of wool or cotton of similar kind but different quality are found in the same package charged at an average price it is the duty of the appraisers to adopt the value of the best article contained in such package and so charge as the average value of the whole. R. S., 2911.

51 Art. 490. When wool of different qualities is imported in the same bale, bag, or package it shall be appraised by the appraiser to determine the rate of duty to which it shall be subjected at the average aggregate value of the contents of the bale, bag, or package, and when bales of different qualities are embraced in the same invoice at the same prices whereby the average price shall be reduced more than 10 per cent. below the value of the bale of the best quality the value of the whole shall be appraised according to the value of the bale of the best quality, and no bale, bag, or package shall be liable to a less rate of duty in consequence of being invoiced with wool of a lower value. R. S., 2918.

Art. 491. When the actual market value of wool at the last place of shipment to the United States, exclusive of charges in such port, shall have been ascertained no further inquiry is necessary to ascertain the value for the purpose of determining the rate of duty to which the merchandise is liable. Circular No. 12, January 22, 1884.

Art. 492. In the appraisement of kid and all other gloves imported into the United States there shall be no discrimination in determining by appraisement the foreign market value of such goods, whether protected by trade-mark or not, and in no case shall gloves so protected by trade-mark be appraised at a less market value than the like goods not so protected, and no sale or pretended sale of such goods shall be held to fix the value of the same. R. S., 2913.

52 Art. 493. When the market value of imports has been fixed

all merchandise of the same character and quality imported from the same market at or about the same time should be valued at the same price, irrespective of the relative quantities in which such imports were purchased, subject, of course, to the condition that duty shall not be assessed upon less than the invoice value or the actual market value. R. S., 2902; S., 3719.

Art. 494. While the foreign market value of imported merchandise as ascertained and returned by the appraisers is to be taken as the dutiable value of the same, under no circumstances can the duty be assessed upon an amount less than the invoiced or entered value. R. S., 2900.

Art. 495. The entered or invoice value spoken of in the statute prohibiting the assessment of duty on less than the entered or invoice value means the cash value, and where goods were invoiced at a certain price, from which a reduction of two per cent. was made in the invoice for cash, and the appraiser disallowed such discount, it was held that he erred. S., 3687.

Art. 496. No deduction can be made from the invoice and entered value of imported goods for the drawback which the English Government allows on the exportation of such goods, such drawback not being deducted nor allowed as a discount on the original invoice. S., 2347.

Art. 497. Where the shipment is made subsequent to the
53 time of manufacture and the market value of the component materials of the goods at the time and place of manufacture differs from the market value of such materials at the place of manufacture and time of export the value of such materials at the place of export must be taken in ascertaining the proper market value. S., 3241; act March 3, 1883, § 9.

Art. 498. The dutiable value of goods bought and sold by weight subject to ad valorem duty shall not be less than the invoice value where the ascertained weight does not vary more than 2 per cent. from the invoice weight. If the ascertained weight exceeds the invoice weight by more than 2 per cent. the duty should be increased in proportion as the weight is increased above the invoice. If the ascertained weight be less by 2 per cent. than the invoice weight the regulations regarding short shipments should govern. S., 5094.

Royalty for the use of a patent is not an element of the dutiable value if no royalty has been or is to be paid by the importer. S., 5759.

Definition of Term "Country."

ART. 499. The term "country" as used in the law is to be regarded as embracing all the possessions of a nation, however widely separated, which are subject to the same supreme, executive, and legislative authority and control.

What are to be regarded as the "principal markets" of a
54 country, in any given case, is for the determination of the appraiser. It is a question of fact, not of law, and the de-

cision of the appraisers is conclusive upon the government and the importer. Stairs *vs.* Peaslee, 18 Howard, 522.

Time of Exportation.

Art. 500. The "time of exportation" must be deemed and taken to be the date at which the merchandise actually leaves the foreign port for its destination in the United States, which period may ordinarily be established by the production of the clearance granted to the vessel at the foreign port and the declaration of the master, under oath, at the time of entry of the date when the vessel sailed.

Art. 501. In the absence, satisfactorily explained, of the usual proofs showing the date of exportation from the foreign country other evidences of that fact, such as letters of advice, entries in the vessel's log book or journal, or testimony of witnesses, may be taken into consideration by the appraisers.

Art. 502. Merchandise from an interior country intended for exportation through the ports of another country to the United States—from Switzerland by way of Havre, for example—is considered as exported within the meaning of the law when it passes the frontier boundary of such interior country.

The wholesale price or general market value of such merchandise in the principal markets of the interior country at the date
55 when it passed the frontier for its destination in the United States will, on importation and entry, be ascertained by the appraisers with a view to the assessment of duty. Satisfactory proof of the date of exportation from such interior country must be exhibited on the entry. Art. 434, Regs. 1874.

Importation from Other than Country of Production.

Art. 503. Merchandise imported from one country being the growth, production, or manufacture of another country will be appraised at its actual value in the principal markets of the country from which immediately imported, unless it appear by the invoice, bill of lading, or other satisfactory proof that the same was, in good faith, destined for the United States at the time of original shipment, without any contingency of diversion, in which case it will be appraised at its value in the principal markets of the country from which originally exported.

Should it happen, however, that the value in the markets of the country of immediate exportation is less than the value in the country of growth, production, or manufacture the case will be submitted to the Secretary of the Treasury for instructions for the adjustment of the duties. Art. 436, Regs. 1874.

Unusual Coverings.

Art. 504. Envelopes designed for use otherwise than in the transportation of the goods which they contained are dutiable at

56 the ordinary rate only if the value is separately specified in the entry. In other cases they are dutiable at the rate of 100 per centum ad valorem. Act Mar. 3, 1883, § 7; S., 5770.

Invoicing at an Average Price.

Art. 505. When merchandise of the same material or description, but of different values, is invoiced at an average price and not otherwise provided for the duty shall be assessed upon the whole invoice at the rate to which the highest-valued goods in such invoice are subject.

Discounts.

Art. 506. Discounts exhibited on the invoice and according to the usual and established usage of the trade may be allowed if claimed on the entry, and also discount if claimed on the invoice and entry of goods shipped by a manufacturer to be sold on his account: Provided, The oaths or affirmations are made by the manufacturer and consignee, as prescribed by existing laws: And provided further, That in both of the above cases the deduction of such discounts does not reduce the invoice value below the general market value of the goods in the principal markets of the country from which imported at the date of exportation.

57 Also chapter 5, part 8, article 1399, to and including article 1410; also articles 1415 to 1417, inclusive, which are as follows:

58 *General Appraisers.*

Art. 1399. It is the duty of the general appraisers of merchandise to supervise the appraisement of merchandise within their assigned jurisdictions by visiting and inspecting the several ports thereof as often as from time to time may be designated by the Secretary of the Treasury for the purpose of supervising the methods of appraisement of dutiable goods and securing uniformity in their values and classifications; to receive from the local appraisers monthly returns of the appraisements of such leading articles of import as may be prescribed; to act on appeals from the valuations of local appraisers; to assist the local appraisers by conference and advice; to keep themselves and the local appraisers informed, from the reports of consuls and Treasury agents and from other available sources, of the ruling prices of export commodities in the leading markets of the world; to meet at the port of New York in February, June, and September of each year for the purpose of comparing the results of their inquiries and the reports received from the several collection districts, and to unite in a report to the Secretary of the Treasury of any variations they may find in the dutiable values or classification for duties of imported merchandise, with such recommendations as may be deemed proper. R. S., 2608; S., 3281.

Art. 1400. The collection districts of the United States will be

from time to time arranged into general appraisement divisions by the Secretary of the Treasury and a general appraiser assigned
59 to duty within each division, with no power to exercise his functions beyond the limits of his division, except when otherwise directed by the Secretary. R. S., 2608; S., 3383.

Art. 1401. For the purpose of properly and practically discharging the duties imposed upon them by law general appraisers are authorized to call for and obtain from collectors, local appraisers, and other customs officers invoices, other documents, and information relative to the importation of goods.

Art. 1402. General appraisers, when examining the files of invoices of contemporaneous or assimilated importations in connection with an appraisement under consideration, will report to collectors and to the Secretary of the Treasury any material inequalities of valuations which may be discovered.

Art. 1403. General appraisers, when visiting the ports within their divisions, should direct their attention to questions connected with the receipt or shipment of foreign goods coastwise in unusual quantities, and ascertain and report the causes thereof, particularly as to the undue advantages afforded at any ports for such excessive coastwise transactions in foreign goods.

Art. 1404. General appraisers should be careful to abstain from expressions of opinion that may have a tendency to disqualify them from acting, with satisfaction to all parties, in cases of appeal from the valuations of local appraisers.

60 Art. 1405. General appraisers will keep a record at their ports of residence in prescribed form of all cases of appeal from decisions of the local appraisers, specifying those on which merchant appraisers have acted and those in which they have been joined with a general appraiser, and forwarding monthly transcripts of such records to the Secretary of the Treasury. S., 2196.

Art. 1406. In their monthly reports to the Secretary of the Treasury general appraisers will report prevailing irregularities in the modes of weighing, gauging, and measuring, and recommend such changes in the system of appraisement as their observation and experience may suggest, giving their reasons therefor in succinct form and accompanying their reports with a tabular statement, exhibiting in prescribed form a comparative view of the appraisements of specified articles at the principal ports in their divisions, reporting any neglect of officers of the customs in forwarding to them their monthly statements. S., 2196 and 3496.

Art. 1407. In cases of appeal general appraisers shall pursue their inquiry into the question of the actual character and dutiable value of the goods under re-examination in such manner as they may deem most conducive to a just and equitable determination of the question. It is expected that they will arrive at that conclusion from their own knowledge and judgments as experts in substantially the same manner as in the case of original appraisements. (See article 474.) S., 2655.

61 *Local Appraisers.*

Art. 1408. It is the duty of local appraisers to diligently and faithfully examine and inspect such goods as collectors may direct, and to correctly ascertain by all reasonable means and report, to the best of their knowledge, the quantity, character, and actual foreign market value thereof, at wholesale, on the day of exportation to the United States in the principal markets of the country whence imported. Their examination embraces the quantity, value, and condition of the goods, and upon their reports are based the classification and the allowance for deficiencies in quantity and damage incurred on the voyage of importation. R. S., 2902 and 2949.

Art. 1409. As the examinations of appraisers are made the basis of the general classification of importations for the imposition and assessment of duty it becomes necessary that appraisers shall closely inspect the articles ordered for appraisement, and where they retain doubts concerning the quality or denomination of articles they shall submit samples thereof, with their opinions, to collectors for transmission, in case of disagreement, to the Secretary of the Treasury. R. S., 2949.

Art. 1410. Appraisers must rigidly exclude unauthorized persons from the rooms where goods are awaiting or are under examination for appraisement and forbid their subordinates to hold communication with interested persons concerning the goods under appraisement. R. S., 2949.

62 * * * * * * *

Art. 1415. In cases of appeal from the decisions of appraisers wherein reappraisals are to be made by merchant appraisers the local appraiser in each case will submit to the collector the names of suitable merchants known to be well qualified and believed to be disinterested and free from bias to aid the collector in making a judicious selection.

Art. 1416. Appraisers are, in cases of reappraisement, to give courteous and due attention to the explanations and statements of importers, in person or by representative, relating to the subject-matter under examination, but they are to limit the privilege so accorded to one person in each single case of reappraisement to receive only statements of fact, to require all facts to be stated concisely and not argumentatively, and to pursue their inquiry into the question of the actual character and dutiable value of the goods under re-examination in such manner as they deem most conducive to a just and equitable determination of the question.

Merchant appraisers appointed in cases of appeal from the decisions of the customs appraisers are also to be governed by this article.

Art. 1417. Examiners of merchandise shall attach their initials to all classifications or packages examined by them, but appraisers shall sign their full names to all reports and submit their official reports in writing.

63 Plaintiffs' counsel then offered and read in evidence the following extracts from instructions issued for the guidance of officers of the customs and others concerned by the honorable Secretary of the Treasury, under date of July 1st, 1885, known as Treasury Department Document No. 712 (at page 227), as follows:

64 Treasury Department Document No. 712. Secretary, M. M. and I. R.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *July* 1, 1885.

To collectors of customs:

The following decisions of the Department for the month of June, 1885, upon the construction to be given to acts of Congress relating to the tariff, navigation, and other subjects are published for the information and guidance of officers of the customs and others concerned.

DANIEL MANNING, *Secretary.*

* * * * * * *

65 At page 245, No. 6957:

Reappraisement of Merchandise.

TREASURY DEPARTMENT, *June* 9, 1885.

SIR: Your attention is called to the instructions of the Department contained in Synopsis, 2655, and to Regulations of 1884, articles 469, 1174, 1407, 1416, relating to the method of procedure in reappraising merchandise. The law of reappraisement is precisely the same as that of original appraisement, and there is no authority or justification for the system, which it appears has grown up in your office, of treating a reappraisement as in the nature of a trial in a court of law, wherein the reappraising officers sit as judges and render decisions according to the preponderance of testimony adduced.

The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question, and it is presumed that the general appraiser will have or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his official duty with a due regard for the rights of all parties and independently of the testimony of interested witnesses.

The functions of the reappraising board are the same as those of the original appraisers. They are themselves to appraise the goods and not to depend for their information upon the appraisement of so-called experts in the line of the goods in question.

66 I am informed that it is the practice to hold reappraisements on certain days of the week, within the hours of twelve and three, and that, owing to the number of appeals pending, two or more cases are often heard at the same time by different merchant appraisers, all acting in conjunction with the general appraiser; that

importers and witnesses are permitted to throng the general appraiser's office, in whose presence the conclusions of the appraising board are often announced, and that if such conclusions are not satisfactory to the importer he is allowed to protest and reargue the case, with a view to a modification of the finding, in which he is often successful.

It is plain that all this is a wide departure from the methods of reappraisement contemplated by the law and regulations, and must necessarily result in injury to the revenue and general demoralization among officials and importers.

The local appraisers are expected to do their full duty in ascertaining, estimating, and appraising the true and actual market value or wholesale price of imported merchandise at the time of exportation and in the principal markets of the country whence the same has been imported. When appeals are taken from the valuation so found it is expected that the general appraiser and merchant appraiser selected to act with him will reappraise the merchandise in substantially the same manner as is pursued on original appraisement.

Section 2922 of the Revised Statutes authorizes appraisers to call before them and examine under oath any owner, importer, consignee, or other person touching anything which they may
67 deem material in ascertaining the true market value or wholesale price of any merchandise imported.

It is by this law that appraisers are authorized to summon witnesses, but there is no authority for the public examination of such witnesses or their cross-examination by importers or counsel employed by such importers.

The appraising officers are entitled to all information obtainable concerning the foreign market value of goods under consideration, but such information is not public property. It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would be of value to the appraisers in determining market values are deterred from appearing or testifying by the publicity given to reappraisement proceedings.

Article 1416 of the Regulations enjoins appraisers to give courteous and due attention to the explanations and statements of importers, in person or by representative, relating to the subject-matter under investigation, but they are to limit the privilege so accorded to one person in each single case of reappraisement, to receive only statements of fact, and to require all facts to be stated concisely and not argumentatively.

This regulation has been so constructed that attorneys-at-law and custom-house brokers have appeared and acted as representatives of the importer on reappraisement. Such a construction is erroneous. The representative of the importer in such cases should be his employé or salesman—some persons belonging to his house familiar with the facts touching the subject-matter under considera-
68 tion. There is no office here for the lawyer or custom-house

broker, and such persons, as well as all others not officially called before the appraisers, should be excluded.

This Department expects that all appraising officers, including the general appraisers, will co-operate in all proper measures for the suppression of undervaluations and be just and uniform — appraisement of imported merchandise, to the end that the tariff laws may be strictly enforced and fair and honorable merchants protected from loss by the dishonest practices of unscrupulous importers.

Very respectfully, DANIEL MANNING, *Secretary*.

Mr. A. J. Perry, United States general appraiser, New York city.

69 At page 249, No. 6959:

Silk, Invoice Values.

TREASURY DEPARTMENT, *June* 10, 1885.

SIR: The Department has received your letter of the 6th instant in regard to the reports of the consular experts at Lyons, Horgen, and Zurich upon invoices of silks imported at Philadelphia.

You state that you have derived but little benefit from these reports because they do not pertain to market value, but furnish only the cost of labor and materials comprising the fabrics embraced in the invoices. For this reason you have virtually ignored them, and have appraised silks according to the values placed upon similar goods by the appraisers at New York.

You say that you have no doubt that all the silk goods mentioned in the schedule accompanying your letter are undervalued, but that owing to the failure of consuls to furnish testimony that would be conclusive to establish market value on appeal the appraising officers are unable to maintain a proper valuation.

Your attention is invited to section 9 of the tariff act of 1883, and you are requested to report the reasons of your failure to adopt the mode of appraisement authorized by said section in cases where the true and actual market value could not be ascertained to your satisfaction.

70 Experts have been employed at several of the foreign consulates for the purpose of enabling the consul to obtain and transmit to appraisers information as to cost of producing silks and other merchandise, so that these officers would have the means of ascertaining the cost or value of the materials composing such merchandise, together with the expense of manufacturing, preparing, and putting up such merchandise for shipment.

It was expected that the appraisers would gladly avail themselves of the information thus furnished and check the growing evil of undervaluing goods consigned to the United States for sale. There appears to be no good reason for the failure of the appraising officers either in Philadelphia or New York to advance invoices of consigned goods which are unquestionably undervalued to equal at least the cost of the production. The fact that a reduction of such advance might be made on reappraisement or that at some other port the

same class of goods may be passed at a lower value is not a valid reason to justify your failure to perform a plain official duty. It is not for you to assume that the importer will appeal from your action or that if he appeals your action may be reversed on reappraisement.

The law (section 2902, Revised Statutes) makes it your duty to ascertain, estimate, and appraise the true and actual market value and wholesale price of the merchandise at the time of exportation and in the principal markets of the country whence the same has been imported into the United States, and when it shall appear that such true and actual market value cannot be ascertained to
71 your satisfaction you are to ascertain the cost of production, pursuant to the ninth section of the act of 1883, referred to, and in no case to appraise the goods at less than the cost so ascertained.

These statutes are plain, and the appraising officers must comply with and enforce them.

Very respectfully, DANIEL MANNING, *Secretary.*

Mr. E. B. Moore, United States appraiser, Philadelphia, Pa.

72 At page 305, No. 7029:

Defining what Constitutes Being "Actually Employed in Aid of the Customs."

TREASURY DEPARTMENT, *July* 20, 1885.

Section 2733 of the Revised Statutes of the United States provides for the payment of compensation to inspectors only when "actually employed in aid of the customs."

In connection with the provisions of the section above referred to attention is invited to the following extract from the opinion of the solicitor of the Treasury of June 24, 1885, as to the construction to be placed upon the opinion of the Attorney General of January 27, 1885, relative to the compensation of inspectors of customs:

* * * * * * *

"The regulations of the Treasury Department provide that where there is a surveyor inspectors are to be assigned to duty by him; otherwise by the collector. It is necessary, therefore, there should be an assignment. After this assignment has once been made it seems to me that an inspector is to be considered as actually employed when he is in a position—when he holds himself in readiness—to perform the duties of his office, whether in point of fact he is doing active service or not. Some part of his duty consists in being vigilant in order to prevent breaches of the revenue law. He is to be on guard, and while guarding he is as much actually employed, in the sense of the statute, as when seizing smuggled or undervalued goods. This watch must be kept as well Sundays and holidays as at any other times.

"In this view of the case I think an inspector is to be paid for Sundays and holidays after he is assigned to duty; also while performing clerical services or awaiting directions, and, in accordance

with an opinion of Secretary McLean, in which I concur, rendered in 1833, under a statute with a similar qualification, while confined by temporary sickness incurred while on duty.

"In all cases, however, the surveyor or collector should be required to certify, for the information of the accounting officer, when the inspector was assigned to duty and when his employment terminated."

73 In conformity with the opinion above quoted payment of compensation will be made hereafter to an inspector of customs for the time during which he is assigned to duty or is awaiting orders.

DANIEL MANNING, *Secretary.*

Collectors and other officers of the customs.

74 Plaintiffs' counsel then called HARRY ROBINSON, who, being duly sworn, testified:

I am employed by the firm of C. A. Auffmordt & Company, plaintiffs in this action. I attend to the custom-house business of the firm. I remember an importation of an invoice of goods by that firm by the ship Main, entered at the custom-house on or about March 13th, 1886. They were cases marked H. Z. 172, 173, and 174. I prepared the entry from the invoice. That entry is on file in the naval office, and the collector's copy is here. The importer's oath is on that entry. The entered value as shown upon the invoice, less the charges and the addition to value made upon the importation, was 7,070 francs. The value of the invoice as made out in Europe was 6,249 francs 50 centimes. As shown by the invoice there were also charges included to the amount of 272 francs 30 centimes, which we deducted. We then added on a memorandum, which we have pasted to the front of the invoice, 1,092 francs 80 centimes. That addition is included in the sum of 7,070 francs as given, but the amount deducted for charges is not included.

We are allowed by the Secretary of the Treasury to take off the charges as expressed in the invoice from the net amount of the invoice, and, taking those charges off, it left a value of 5,977 francs 20 centimes, to which we added our value of 1,092 francs 80 centimes, making 7,070 francs, and on that amount we paid duty at fifty per cent. Afterwards an addition was made by the appraisers,

75 so that it made the total amount 7,510 francs 10 centimes instead of 7,070 francs that we paid fifty per cent. duty on. The appraisers added 440 francs 10 centimes. The additional duty thus paid at fifty per cent. amounted to forty-two dollars. We were notified by the collector to pay the additional duty on the 20th of April and also on the 21st of June. That notice of the 20th of April was in writing. It was a notice by the collector, signed by his deputy, notifying us of an additional duty accruing on the entry, which, if not immediately paid, would be put in suit against us. It differs from the notice of advance; it is a notice sent us on liquidation of the entry. A blank notice of dissatisfaction was furnished us by the custom-house. We used such a blank in connection with this im-

portation. We left it with the custom-house about March 22d. We left it with Mr. Hagan. That is the paper so left. At that time there was none of the writing now on the back of the paper.

This paper was read in evidence as it originally was filed and was marked Plaintiffs Exhibit 1, and is as follows:

"N. Y. Cat. No. 542.

Importer's Notice to Collector Claiming Reappraisement.

PORT OF NEW YORK, *March 22nd*, 1886.

SIR: As I consider the appraisement made by the United
76 States appraisers too high on silk and cotton satins, on all items advanced imported by us in the Main from Bremen, I have to request that the same may be reappraised pursuant to law with as little delay as your convenience will permit.

Very respectfully,

C. A. AUFFMORDT & COMPANY,
By H. ROBINSON.

To E. L. Hedden, Esq., collector of customs."

When I left this notice I had the invoice with me. I took the notice from Mr. Hagan (the notice of advance by the appraiser) to the naval office, where it was checked by the naval office cashier, thence to the cashier's office of the collector's department, where I paid upon it ten dollars; then, leaving the notice there, I took the invoice back to Mr. Hagan, where my connection with it ceased. That notice that I left with the cashier was the notification sent the importer by the collector after the invoice gets to the collector from the appraiser's office, on the basis of which he makes up his mind whether he is going to file one of these notices to demand reappraisement or not. Mr. Hagan was the collector's clerk in charge of such matters. The fee of ten dollars was demanded as a fee for the merchant appraiser; it appears upon that notice. I paid the ten dollars and got those memoranda made on the notice, be-
77 cause without those memoranda and checks and the payment of ten dollars the invoice would not be sent for reappraisement. That was the course of business. Plaintiffs received no other notice from the collector in respect to that importation after that date and prior to April, nor was any received, except one in April, of which I have spoken, until that received in June. This notice in April was after the so-called reappraisement was had.

Further examination of the witness being suspended at this point in order to enable plaintiff to identify certain papers to be used in this case on further examination of this witness, defendant's counsel elected to cross-examine the witness upon his evidence given thus far, and he testified as follows:

Cross-examination:

Plaintiffs raised their original invoice value themselves. We thought the invoice did not show the true value, so we raised it. We added forty-five centimes to the first two items, twenty centimes to the third item, thirty-five centimes to the fourth item, and fifteen centimes to the fifth item. This was done at the time of entry. I attended to this part of the business. I did it on comparison with other goods—other goods from the samples. I did it without oral instructions. I did it on consultation with the heads of the department to which the goods belonged. I did it on my own judg-
78 ment. The notice of advance I delivered to Mr. Hagan. He returned it to me with the notice, and I took it to the naval office cashier and left it with the cashier of the collector's department. I did not ask the cashier to return it, because on previous occasions when I had been through the same course of business he had refused to. I paid the ten dollars to one of the clerks in the cashier's department; with it gave him the invoice and the notice of advance. The advance was made before the entry was sworn to.

Further examination suspended.

Plaintiffs then called JOHN V. VAN ARSDALE, who, being duly sworn, testified as follows:

I am searcher of records in the custom-house. I looked to see whether there was a record of any decision by the Secretary of the Treasury on certain appeals of C. A. Auffmordt & Company, lodged on or about April 29th, covering an importation by the steamer Main of March 13th, 1886. There was no decision; did find a record of such protests and appeals. I recognize the papers now produced as two protests and appeals lodged in the custom-house on April 29th, 1886.

Which, being offered and admitted in evidence, were read as follows:

PLAINTIFFS' EXHIBIT No. 2.

79 To the collector of customs, port of New York.

SIR: We hereby give you notice, pursuant to the requirements of existing laws, of our dissatisfaction with your ascertainment, decision, liquidation, and demand for duties on our importations of merchandise by the following vessels and on each and every such importation, viz: Hat materials, manufactures of silk and of silk and cotton.

Steamer Main, March 13, 1886.

The grounds of our dissatisfaction, objection, and protest, both against any and every payment we have made or may be required to make or may make on said importations, are as follows:

We claim that the said merchandise is not dutiable at the rates charged by you, because said merchandise is millinery trimmings or hat materials and is dutiable only at twenty (20) per cent. ad

valorem under par. 448, T. I. (new), Schedule N, of existing tariff, reading:

"Hats, and so forth, materials for braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone, or any other substance or material not specially enumerated or provided for in this act, twenty (20) percentum ad valorem;" and because if not so dutiable said goods, composed of silk and cotton or composed of silk and any other materials, do not contain sufficient silk to warrant duty beyond thirty-five (35) per cent. if not dutiable at twenty (20) per cent., as otherwise herein claimed; and we also claim that the manufactures of silk and cotton in said entries contained, charged by you with duty at the rate of fifty (50) per cent., are not in any event dutiable beyond the rate of forty (40) per cent., silk not being chief value.

We also claim that the true and lawful duty on said merchandise is to be based and estimated upon the actual foreign market value, by which such goods are bought and sold in foreign markets, and that the additions to said value of the charges for packing and putting up which were required by you to be placed upon the entry as a part of the so-called dutiable value were illegal and unwarranted; that your refusal to permit said merchandise to be entered on said invoice and at the value thereon expressed, with said additions or deductions allowed, was unlawful and unwarranted, and we made our entry as aforesaid involuntarily and under your compulsion; that your menace to impose a penalty on our said merchandise unless we made the additions of said undutiable items to the true invoice value as you required them to be made was unwarranted by law, and that we made such additions only in order to avoid said penalty and to obtain and retain possession of our goods; and we claim that the additions compulsorily made to the invoices and entries by or under the direction of the revenue officers are unwarranted by law, and that our said dutiable merchandise has been unlawfully appraised, and has been so appraised in excess of ten (10) per cent. of the
80 true invoice or entered and true dutiable value thereof, and we protest against your permitting the appraiser to appraise said undutiable items, and we insist that you request the appraiser to appraise only the merchandise subject to duty, and that when our said importations are so appraised we are not liable to any penalty; and we further expressly protest that under the pretext of adding to make market value there has been assessed duty on charges for packing, putting up coverings of various kinds, packing materials, labor in packing, and other miscellaneous charges which under the law are exempt from duty, but that nevertheless you, in fraud and evasion of the law, have instructed the appraiser and have permitted him to collude with you, in violation of the law, to aid you in charging, and you have charged us, in fraud of our rights and evasion of law, a tax upon said undutiable charges, and on cartons the usual and necessary sacks, crates, boxes, coverings, packages, and putting up which, by and with your knowledge, direction, approval, and consent, were included by the appraiser knowingly, fraudulently,

and illegally in his so-called appraisement of said invoices, against which we also further hereinafter protest. We also claim that the true and market value of said goods is the amount which we paid for the same, which amount is expressed on said invoices; and we also claim that the appraiser has not fully and fairly examined the goods, and that he has not exercised his free judgement in respect to the said values, and that his pretended appraisement has been unlawfully made under the suggestion, direction, and undue influence of the Secretary of the Treasury and the special agent of the Treasury and other unauthorized persons, and that the said pretended appraisement was not in fact the appraisement of the assistant appraiser or of the appraiser, but was the record of the determination of some other officer or person who was without lawful authority to appraise the said merchandise. We likewise protest against the additions made without authority of law to our invoice value and entered value, which are excessive and beyond the true and actual value, and we hereby demand a reappraisement of said merchandise.

We likewise protest against the fees or special compensations of any nature whatsoever exacted from us on the entries and liquidations of the entries and appraisements or reappraisements of said goods, and on all duties on the cost or value of all packages, cartons, the usual and necessary sacks, crates, coverings of every kind, boxes, commissions and charges for packing, insurance, preparing, putting up, and against any duty charged us on foreign commissions or additions of the appraiser as and for such commissions or for so-called factor's or manufacturer's profit, and other miscellaneous charges of every kind or nature whatsoever, and against including the same or any part thereof in the dutiable value, all of the same being unwarranted by law. We claim the proper and lawful duty on said goods is to be based and estimated on the true and actual foreign value thereof, if ascertainable, and, if not, then on the cost of production; and we claim also that the boxes and coverings on said goods,
81 if dutiable at all (and we say they are not), are not chargeable with duty as assessed by you, but only at the rate chargeable upon the materials of which they are composed; and we furthermore protest against the so-called reappraisement and appraisement of said goods as being irregular and unlawful, and that the merchant appraiser was not qualified by law to act as such; and we also protest against the payment of any and all duties not legally chargeable upon said importations, and, hereby reserving all questions of law or fact that may arise, will specify further details as may be required by you.

Your ascertainment, liquidation, and exactions as aforesaid are submitted to under compulsion, and we pay said illegal exactions only for the purpose of obtaining or retaining possession of our goods, and we claim a refund accordingly. You are hereby notified that this protest is intended to apply to all future similar importations and to all our pending and unliquidated and liquidated entries, whether for warehouse or for consumption or on withdrawal from warehouse on the importations above specified, and to all other

of our previous importations, and that the duplicate protest, which is herewith submitted for transmission by you to the Secretary of the Treasury, is our appeal to him from your decision against this protest, and also from your exaction on all such entries in future as fully as if formally made on each entry thereof; and this protest is expressly hereby made to apply to all similar future exactions. In the event that you shall not yet have made your final decision on any of our said entries or respecting said exactions, you are hereby notified to read this protest, then, in your office upon rendering final decision, of which you are hereby requested to notify us.

Respectfully, C. A. AUFFMORDT & CO.,
By TREMAIN & TYLER, *Att'ys.*

Dated New York, April 27th, 1886.

Appeal.

To the Secretary of the Treasury.

SIR: We hereby appeal from the decision of the collector of customs at this port on the above importations for the reasons specified in our foregoing protests.

Respectfully, TREMAIN & TYLER,
Att'ys for C. A. Auffmordt & Co.

Office and P. O. address, No. 167 Broadway, New York city.
Dated New York, April 27th, 1886.

(Stamp endorsed:) Custom-house, New York, April 29, 1886. Received.

Also—

PLAINTIFFS' EXHIBIT No. 3.

82 To the collector of customs, Port of New York.

SIR: We hereby give you notice, pursuant to the requirements of existing laws, of our dissatisfaction with your ascertainment, decision, liquidation, and demand for duties on the importations of merchandise therein mentioned and embraced in our entries, and each and every of them, as follows, viz:

Merchandise.	Vessel.	
Hat materials, manufactures of silk and of silk and cotton.	Main	March 13, 1886

The grounds of our dissatisfaction, objection, and protest, both against any and every payment we may have made or may be required to make or may make thereunder, are as follows: We claim that the true and lawful duty on said merchandise is to be based

and estimated upon the actual foreign market value by which such goods are bought and sold in foreign markets, and that the additions to said value of the charges for packing and putting up which were required by you to be placed upon the entry as a part of the so-called dutiable value were illegal and unwarranted; that your refusal to permit said merchandise to be entered on said invoice and at the value thereon expressed with said additions or deductions allowed was unlawful and unwarranted, and we made our entry as aforesaid involuntary and under your compulsion; that your menace to impose a penalty on our said merchandise unless we made the additions of said undutiable items to the true invoice value, as you required them to be made, was unwarranted by law, and that we made such additions only in order to avoid said penalty and to obtain and retain possession of our goods; and we claim that the additions compulsorily made to the invoices and entries by or under the direction of the revenue officers are unwarranted by law, and that our said dutiable merchandise has been unlawfully appraised, and has been so appraised in excess of ten (10) per cent. of the true invoice or entered and true dutiable value thereof; and we protest against your permitting the appraiser to appraise said undutiable items, and we insist that you request the appraiser to appraise only the merchandise subject to duty, and that when our said importations are so appraised we are not liable to any penalty; and we further expressly protest that under the pretext of adding to make market value there has been assessed duty on charges for packing, putting up, coverings of various kinds, packing materials, labor in packing, and other miscellaneous charges which under the law are exempt from duty; but that, nevertheless, you, in fraud and evasion of the law, have instructed the appraiser and have permitted him to collude with you, in violation of the law, to aid you in charging, and you have charged us, in fraud of our rights and evasion of law, a tax upon said undutiable charges and on cartons, the usual and necessary sacks, crates, boxes, coverings, packages, and putting up, which, by and with your knowledge, direction, approval, and consent, were included by the appraiser knowingly, fraudulently, and illegally in his so-called appraisement of said invoices, against which we also further hereinafter protest. We also claim that the true and market value of said goods is the amount which we paid for the same, which amount is expressed on said invoices; and we also claim that the appraiser has not fully and fairly examined the goods, and that he has not exercised his free judgment in respect to the said values, and that his pretended appraisement has been unlawfully made under the suggestion, direction, and undue influence of the Secretary of the Treasury and the special agent of the Treasury and other unauthorized persons, and that the said pretended appraisement was not, in fact, the appraisement of the assistant appraiser or of the appraiser, but was the record of the determination of some other officer or person who was without lawful authority to appraise the said merchandise.

We claim also that the general appraiser and the merchant appraiser did not fully and fairly examine the goods, and did not

comply in this respect with the directions of the Secretary of the Treasury, and that said reappraising officers did not proceed and were not qualified according to law, and said merchandise was not reappraised by reasonable ways and means or by any lawful board having authority so to act, nor was it appraised in any lawful way; that the undersigned were not permitted to attend upon said proceedings either in person or by agent or by counsel; that witnesses were privately examined in their absence; that the undersigned were not permitted to confront opposing witnesses by testimony in their own behalf, or to examine or cross-examine any witnesses, or to have the benefit of counsel on said pretended reappraisement; that the provisions of the tariff act of March 3d, 1883, respecting the methods of appraisement were not pursued; that in the absence of proof as to an actual market value the cost of production was not ascertained; that divers undutiable items were appraised as part of the dutiable value; that the witnesses called by said appraising board testified to values other and less than the figures designated by said board, which were unsustained by any competent evidence whatever adduced before said board; that you would not release said goods or permit said merchandise to be reappraised upon our demand therefor without exacting from us payment as and for compensation for said merchant appraiser an amount unwarranted by law; and we protest that said reappraisement was altogether irregular, unlawful, fraudulent, and void, and not in conformity to our demand therefor and the laws and regulations applicable thereto; and also that your appointment of merchant appraiser to assess duties on our said importations was unlawful and void, and that you have no warrant or authority therefor, nor had such appraiser any lawful qualification or right to act officially in the premises, and we hereby demand a reappraisement of said goods, to be conducted according to law.

We also particularly protest and object to Mr. J. C. McCreery acting as a so-called merchant appraiser in association with the general appraisers for the reappraisement of our said invoices, and we object to your selection and appointment of him, because he is not legally qualified or competent to act in that capacity; because he is not a discreet and experienced merchant; because he is not a merchant impartial and unprejudiced and authorized by law to act; because he has no familiarity or experience with the market value of such goods as are covered by our said importations, and because the law required the selection as so-called merchant appraiser of a person fully qualified according to the description of said law, and such a person has not been lawfully appointed; because a reappraisement certified to by said Mr. J. C. McCreery or any such unqualified or unauthorized person renders said reappraisement illegal, irregular, invalid, and void in law as it was unfair in fact, and because you had no authority to appoint him.

We also protest that the reappraising officers disregarded our protests and objections made at the time of reappraisement, and that we were prevented from examining the written statements of the witnesses called on said reappraisement, notwithstanding said

statements were examined and read by the reappraising officers and influenced their minds in reaching the results they arrived at; and we protest against the exclusion of the agent, factor, or broker, as well as counsel, of the importers, and that the special agent of the Treasury was permitted to be present and to produce and examine witnesses for the Government, and was permitted to influence the appraiser and general appraiser and merchant appraiser both in respect to the value and the character of said goods, and by the expressions of his opinions, statements, and arguments; and we also protest that the appraisers and each of them had prejudged the case before the importer was heard, and that because a special Treasury agent was permitted to confer with the general appraiser and merchant appraiser in the making of the report after the testimony had been received, and was permitted to represent or act as counsel for the Government, to the prejudice of the rights and interest of the importers, and because competent and material statements on the said reappraisement were excluded and improper statements read as evidence and testimony of American manufacturers and merchants having no familiarity with the merchandise and its market value were received, and because said reappraisers disregarded the evidence and acted upon their own supposed knowledge, and their decision was contrary to the facts and evidence and contrary to law, and because said examiner and merchant appraiser or either of them acted in fraud and evasion and disregard of law and in collusion with the collector of the port and the Secretary of the Treasury for the purpose of exacting excessive and illegal duties paid as herein stated and against which we earnestly protest.

83 We further protest that none of said goods were properly examined by the examiner or the assistant appraiser or either of them, and that the said reappraisers did not diligently and faithfully inspect and examine said goods described in said invoice as were ordered to the public stores by the collector to be appraised.

We also protest that there was no fair examination by the appraisers or by the merchant appraiser or the general appraiser of the said goods, and that said reappraisement was conducted in fraud of the importer and by collusion with adverse or rival interests, and by information or advice not communicated to the importers, and on evidence unknown to them, which they were afforded no opportunity to controvert, and without a hearing.

We likewise protest against the fees or special compensations of any nature whatsoever exacted from us on the entries and liquidations of the entries and appraisements or reappraisements of said good, and on all duties on the cost or value of all packages, cartons, the usual and necessary sacks, crates, coverings of every kind, boxes, commissions and charges for packing, insurance, preparing, putting up, and against any duty charged us on foreign commissions or additions of the appraiser as and for such commissions or for so-called factor's or manufacturer's profits, and other miscellaneous charges of every kind or nature whatsoever, and against including the same

or any part thereof in the dutiable value, all of the same being unwarranted by law.

We claim the proper and lawful duty on said goods is to be based and estimated on the true and actual foreign value thereof, if ascertainable; and, if not, then on the cost of production; and we claim also that the boxes and coverings on said goods, if dutiable at all (and we say they are not), are not chargeable with duty as assessed by you, but only at the rate chargeable upon the materials of which they are composed; and we furthermore protest against the so-called reappraisement and appraisement of said goods as being irregular and unlawful; and we also protest against the payment of any and all duties not legally chargeable upon said importations, and, hereby reserving all questions of law or fact that may arise, will specify further details as may be required by you.

Your ascertainment, liquidation, and exactions as aforesaid are submitted to under compulsion, and we pay said illegal exactions only for the purpose of obtaining or retaining possession of our goods, and we claim a refund accordingly. You are hereby notified that this protest is intended to apply to all future similar importations and to all our pending and unliquidated entries, and that the duplicate protest, which is herewith submitted for transmission by you to the Secretary of the Treasury, is our appeal to him from your decision against this protest, and also from your exaction on all such entries in future as fully as if formally made on each entry thereof; and this protest is expressly hereby made to apply to all similar future exactions. In the event that you shall not yet have made your final decision on any of our said entries or respecting said exactions, you are hereby notified to read this protest then in your office, upon rendering final decision of which you are hereby requested to notify us.

Respectfully,

C. A. AUFFMORDT & CO.,
By TREMAIN & TYLER, *Att'ys.*

Dated New York, April 29, 1886.

Appeal.

To the Secretary of the Treasury.

SIR: We hereby appeal from the decision of the collector of customs at this port on the above importations for the reasons specified in our foregoing protests.

Respectfully,

TREMAIN & TYLER,
Att'ys for C. A. Auffmordt & Co.

Office and P. O. address, No. 167 Broadway, New York city.

Dated New York, April 29, 1886.

(Stamp endorsed:) Custom-house, New York, April 29, 1886. Received.

84 Plaintiffs then called GEORGE V. BROWER, who, being duly sworn, testified as follows:

I was general appraiser at New York in April, 1886, and acted upon the case where C. A. Auffmordt & Company imported goods marked and numbered H. Z. cases 172 to 174 on or about April 8th, 1886. I made the formal report we make in all such cases to the collector. Some one assumed to act officially in conjunction with me on that occasion. I think no other communication in writing to the collector of the port in respect to that said importation was made than that formal report. The collector of the port did not, to my recollection, make any communication to me respecting that importation. I do not remember having in my possession any paper from the collector respecting that importation, except the formal notification which passed from one office to another in relation to reappraisal. My best recollection is that there was a formal notice of appeal to the general appraiser on one of the custom-house forms; nothing else. I think those notices are sent to the collector's office with the report. The usual course of business is for my clerk to send those papers. That notice is upon one of the forms prescribed by the Treasury regulations. Looking now at the endorsement of this paper (Plaintiffs' Exhibit No. 1), I presume that was the notice. In addition to this I received this affidavit of the merchant appraiser. It was sent to my office from the collector for the
85 merchant appraiser to sign. To the best of my recollection, these two papers, namely, Plaintiffs' Exhibit No. 1 and another paper which I identify, which is not yet in evidence, are the only two papers which I received from or on behalf of the collector in respect to this importation. (The other paper referred to is marked for identification Plaintiffs' Exhibit No. 4, being the oath of the merchant appraiser hereinafter recited.)

I do not remember ever having had any conversation with Mr. Hedden respecting this importation; nor do I remember ever having had any communication with the Secretary of the Treasury respecting this importation. I never have had any conversation with the Secretary of the Treasury respecting this particular importation. The paper now shown me (now marked for identification Plaintiffs' Exhibit No. 5, as hereinafter recited) is the official report to which I have referred. That is the only paper signed by me relating to this importation which I sent to the collector. In answer to the subpœna I have produced a memorandum showing the record of the cases that were before me on April 8th, 1886, folios 162 and 163 of the book (marked for identification Plaintiffs' Exhibit No. 6), — is the one referred to. Besides these papers I have mentioned I have the report in connection with this importation that is sent to the collector, together with my memorandum of my action thereon or the action of the merchant appraiser and the general appraiser.

I also have the three depositions of witnesses. (Depositions
86 are produced and identified by the witnesses and marked for identification Plaintiffs' Exhibits 8, 9, and 10.) I also produce this paper called the face paper. (The face paper and the two

parts of the report are marked for identification Plaintiffs' Exhibits Nos. 7, 11, and 12, and are again referred to at a subsequent place in this bill of exceptions.) The depositions are of Emil Horand, Robert J. Bechner, and R. S. Roberts. I think I took the statement of the examiner on that occasion.

Q. Did you proceed on that appraisement in accordance with instructions of the Secretary of the Treasury, dated June 9th, 1885, and prior thereto, in respect to the method of procedure? (The instructions referred to, dated June 9th, 1885, are set forth elsewhere in this bill.)

To which question defendant's counsel objected, that it was incompetent, irrelevant, and immaterial; and the court sustained the said objection, and plaintiffs' counsel duly excepted.

—. I remember Mr. McCreery's being there on that occasion.

Plaintiffs' counsel then called JAMES CRAWFORD MCCREERY, who, being duly sworn, testified:

I am a merchant in New York and remember that I acted as merchant appraiser in cases of silk and cotton goods of C. A.
87 Auffmordt & Company; the dates I cannot remember. I went to the public stores pursuant to some written paper that was sent me. I have not that paper. When I went to the public stores pursuant to that paper I first reported to Deputy Collector Jones' office.

On being shown Plaintiffs' Exhibit for Identification No. 5, said:

I recognize my signature attached to this document as merchant appraiser. To the best of my recollection I acted in conjunction with Mr. Brower on a certain importation of Messrs. Auffmordt, marked H. Z. cases 172 to 174.

Q. Did you at that time and on that occasion act in any other cases?

Objected to by defendant's counsel as immaterial and irrelevant.

PLAINTIFFS' COUNSEL: We propose to show that when this gentleman was appointed, if he ever was appointed, he was appointed to act at this time upon a great many cases, and that the same authority he had for this case he had for the others. The same authority he had for the other cases was his authority for this; hence, the only way he gets into this case is in this omnibus appointment.

The COURT: If you claim that he was not appointed merchant appraiser and acted in this case——

Mr. TREMAIN: Certainly.

The COURT: Well, I thought your testimony went to show he was.

88 Mr. TREMAIN: Yes, sir; that he acted, but the question is, his authority to act. But what I propose to show is that when Mr. McCreery went there he went for the purpose of acting upon any cases, and that while there he did act upon a great many

and that they were all, so far as he was concerned, acted upon under the same authority and acted upon at the same moment. I want to take his recollection about that.

The COURT: You may ask him about this case—this importation—and we will leave out the others for the present.

Mr. TREMAIN: Very well, sir, perhaps I will make it clearer later in the case.

Q. Do you remember acting, at the same moment that you acted on this case, on any other cases?

Objected to by defendant's counsel as irrelevant.

The COURT: That is excluded.

Plaintiffs' counsel duly excepted.

Q. Do you remember what you did with the paper by virtue of which you assumed to act in this case?

A. I presume it is in Deputy Collector Jones' office, which is located in an office right through the main entrance of the public stores—the appraiser's stores.

Q. Have you any knowledge that he is deputy collector?

A. I presume he is; the mere knowledge that I have of the official existence of a great many other people.

89 Q. All you know is that you took an oath before him and that he assumed to administer it. Do you remember that?

A. Yes.

Q. Do you remember that prior to your acting upon this particular case on the 8th of April you did take an oath of office? I will refresh your recollection by one of the papers that has been marked for identification.

A. Yes; I find my name attached to the usual document in such cases.

Q. Did you take more than one oath or is that the only one you took on that day?

Defendant's counsel objected to that question as immaterial, irrelevant, and incompetent. It is immaterial unless it relates to this case.

The COURT: You may ask him whether he took any more in this case.

Q. Did you take any other oath on that day?

DEFENDANT'S COUNSEL: I object to that.

Q. On that occasion, at that time?

The COURT: If it refers to this case he may answer; if not, not.

Q. Did you take any other oath at that time that relates to this case?

A. No; I did not.

Q. What circumstance, if any, upon that paper indicates to you that it has relation to this particular case?

A. There is a number up here in red ink (referring to paper marked for identification No. 4).

Q. There are two numbers there. Do both refer to this case?

A. I don't know anything about that. That does not come
90 within my official cognizance as merchant appraiser.
Q. You didn't put those numbers there?
A. No, sir.
Q. Were they there when you took the oath?
A. Yes, to the best of my recollection.
Q. You remember by whom the paper you say you left with Mr. Jones was signed or purported to have been signed?
A. No; I could not positively state.
Q. You have had a great many such papers, have you?
A. Yes, sir.
Q. Give your best recollection as to how it was signed or purported to have been signed.

The COURT: How what was signed?
Mr. TREMAIN: The paper he says he left with Colonel Jones at the time he took his oath.
Mr. PLATT: A paper relating to this case?
Mr. TREMAIN: I assume so.

Q. State to the best of your recollection how it was signed?
A. I could not state whether it was signed by Mr. Hedden as collector of the port or by somebody else.
Q. You have received them signed both ways?
A. I have received them signed both ways, I believe.
Q. How are they usually signed when you receive them?

Defendant's counsel objects.

PLAINTIFFS' COUNSEL: I will not press it. We now call for the production of that paper, and if it be not produced we ask to suspend Mr. McCreery's examination until we call Col. Jones to give us the contents of it.
91 The COURT: I understand Mr. McCreery that he had some paper that informed him he was to act as merchant appraiser, and he went down and took the oath; that he was shown something that is called the oath, and that he left the paper there. Now, if there is anything else for this witness finish it, because the necessity of having that particular paper is not so apparent that we ought to be shifting witnesses.
PLAINTIFFS' COUNSEL: We wish to have this witness' recollection refreshed by an inspection of that very paper, and then to ask him, when it is refreshed in that way, whether or not it is not true that on this occasion, April 8th, when he assumed to act upon this importation, he at the same moment, at the same time, acted on a great many others by the same authority.
The COURT: You may ask him about that.

Q. Did you, pursuant to that paper, whatever it was, and this oath, and at the time that you acted upon this particular importation, April 8th, 1886, act upon several other importations?

(Objected to.)

A. I think I did.
Q. About how many?

Mr. PLATT: I object to that as immaterial and irrelevant.
The COURT: I don't see that this is of any consequence.
Mr. TREMAIN: That is one of the reasons why we didn't have an appraisement—that somebody else had one at the same time.
92 The COURT: If you had one that would be enough for you?
Mr. TREMAIN: We are showing that somebody else had one, and that therefore we did not; that something else was going on at the same time.
The COURT: I think if you had an appraisement that would be sufficient, although somebody else had one.

Plaintiffs' counsel excepted.

The COURT: We will take the fact that some other appraisals were going on at the same time.

Q. And about how many?

The COURT: The number of them we don't care anything about, nor whose they were.
Mr. TREMAIN: I take the benefit of an exception as to how many there were.

Being cross-examined by defendant's counsel, the witness answered as follows:

Q. Do you recollect now how long you were on this particular appraisement?
A. No.
Q. While this appraisement was under consideration do you mean to be understood that there were other reappraisements going on at identically the same time or during the same day?
A. I think that I was merchant appraiser upon several cases upon the same day.
Q. And they were taken up one after the other?
A. No; not necessarily.
Q. Have you any recollection about that?
A. No; not definite.
93 Q. Have you any recollection about this reappraisal except as being refreshed here from the record?
A. Of this particular one? No.

By Mr. TREMAIN:

Q. Have you any copy of this paper which you say you left with Col. Jones?
A. No; not now.

Plaintiffs then called WILLIAM A. JONES, who, being duly sworn, testified as follows:

I am deputy collector, stationed at the public stores. (Upon being shown paper marked for identification Plaintiffs' Exhibit No. 4, —

said:) I recognize that paper. I assumed to administer that oath of office on April 8th to Mr. McCreery. I cannot state positively whether Mr. McCreery left with me a paper relating to this subject, as it was competent for him to have taken it away, as it was addressed to him, but the paper was presented to me by Mr. McCreery signed by the collector. I remember the paper. I would not have administered the oath unless he had such a paper. I make no record of such oaths; am in the habit of administering oaths to merchant appraisers. I usually administer an oath in each case in which the merchant appraiser is to act. I have administered as high as fifty to one merchant appraiser in one day and administered as many as fifty different oaths to different parties. I think I have also given one oath in many different cases; am not aware that there is any uniform practice in this respect. These oaths are sometimes administered in the custom-house.

94 Q. But that is exceptional?

A. As a rule they are not. There is no paper on file in my office relating to the appointment of any merchant appraiser during the months of March or April, 1886. The record of these papers so issued is kept in Mr. Treloar's office, as I understand it. The paper itself is a notice issued to the merchant, and it is entirely competent for him to take it away or destroy it or do what he pleases with it; the oath itself becomes the record. The paper given to the merchant is not under seal; it is usually signed by the collector or one of his deputies acting in his stead during his absence. I have no recollection as to how the paper exhibited to me in this case was signed. There is a tag appended to the oath which has been forwarded to me by the collector; then, the notice being presented, I note from the numbers indicated on that tag, if they correspond with those on the notice, that they are those called for. I usually administer one oath in each case. Usually where there are several cases, as I before stated, there are several oaths indicated, as I assume by these several numbers attached to the tag. I notice there are two on this oath. At this date I cannot remember whether I put my signature to more than one oath for Mr. McCreery. According to those numbers that paper (the oath) might apply to more than one importation. I should say so, as there are two. As I understand it, those numbers indicate at least two importations to which it

95 alludes. The numbers are 3164 and 9389, and are the invoice numbers of two such importations, to the best of my knowledge.

Being cross-examined, he said:

I administered the oath to Mr. McCreery in this case. I recognize the paper marked for identification Plaintiffs' Exhibit No. 4 as the oath administered. I have been in the custom-house about seventeen years.

Q. You are well acquainted with the ways of business respecting the appointments of merchant appraisers?

Mr. TREMAIN: I object, on the ground that this is not proper cross-

examination upon anything brought out by us. The ways of doing business have differed at different epochs. At this time one practice might prevail, and at another time another practice. We object to the question on the ground that what the special deputy does is incompetent on this cross-examination and immaterial and irrelevant.

The COURT: We will take it.

Plaintiffs' counsel duly excepted.

A. I will answer this way: That the notice is signed by the collector or one of his deputies.

Q. In the absence of the collector who, in the ordinary course of business, signs?

Plaintiffs' counsel objected as immaterial, irrelevant, and incompetent.

The COURT: That is admitted.

96 Plaintiffs' counsel duly excepted.

A. One of the deputies.

Q. Does the collector usually designate a special deputy to act in his absence?

Mr. TREMAIN: We object to that on the ground that the usage cannot be proved by this witness. What the collector may have done usually, or what Mr. Hedden did in this particular case, are two different things, possibly. The habit in cases of merchant appraisers cannot be proved by a witness who has not testified that he knows.

The COURT: I understand him to have been in the custom-house seventeen years.

Mr. TREMAIN: Yes, sir; at the public stores.

The COURT: Right where these merchant appraisers act who are appointed?

Mr. TREMAIN: Yes; but he knows nothing about what was done at the examination.

The COURT: But he knows what they bring.

Mr. TREMAIN: I do not want him cross-examined about the custom-house, when we know and he knows that he has nothing to do with that business; never got up any of these papers and cannot testify anything about it.

The COURT: He may answer.

Plaintiffs' counsel duly excepted.

The COURT: You may ask him if he knows about that.

By defendant's counsel:

97 Q. Do you know what the usage is in that respect?

Plaintiffs' counsel objected as immaterial, irrelevant, and incompetent and as involving a conclusion of law.

The COURT: He may answer.

Plaintiffs' counsel duly excepted.

The COURT: The point is whether you know and are familiar with the custom about it.

A. I know that the collector usually has a special deputy.

The COURT: The point is whether this witness is so situated with reference to the custom-house as to know the practice of the collector to designate a special deputy.

By defendant's counsel:

Q. Have you any knowledge on that subject?

A. I think I have.

Q. I now repeat my question, whether the collector does not usually designate a special deputy to act in his absence?

PLAINTIFFS' COUNSEL: We take the same objection to that; and, it being overruled, plaintiffs' counsel duly excepted.

A. The collector usually has a man designated as special deputy, though there have been times when there was none. The notices that come to me are usually signed by the collector or one of his deputies—not necessarily a special deputy. Colonel Bartram, who has never been a special deputy, has signed a great many of
98 them. I could not at this date recall who signed the notice of appointment of James C. McCreery in this case. Those notices are no part of my official records. They are simply addressed to the merchant—a notice that he has been appointed—and the figures, as I stated before, upon the notice, occurring upon this oath which has been forwarded to me meantime, indicate to me at the time if those are the proper oaths to administer in a given case.

Q. And you administer an oath in each case, do you?

A. Not necessarily; I don't know that I always do in each case.

Q. Not necessarily in each case?

A. I don't know that I do; in this case I should judge by the figures—numbers on that notice—that there were two cases indicated there; there are two numbers; not two cases of goods, but two cases of reappraisement.

Q. (Showing witness paper marked for identification No. 4.) To what numbers do you refer?

A. 3164 and 9389.

Q. In red ink?

A. Yes, sir.

Q. And the figures 3164 are erased in red ink—crossed off in red ink?

A. If those were not erased at the time——

Q. I ask you whether that is so or not?

A. Yes; it is so, evidently.

Q. Did you notice these figures on there at that time?

A. I did at the time I administered the oath; always do.

Q. You remember that distinctly?

A. I swear to that because I would not administer the oath without noticing that the figures correspond with the notice; therefore, I am able to swear to it. I compared these figures on the
99 oath with the figures on the notice at the time I administered the oath.

Being re-examined by plaintiffs' counsel, the witness said:

Q. Did you ever have anything to do yourself during the last few years with the appointment of merchant appraisers?

A. Never.

Q. As a matter of fact, you don't know the process by which they are selected down at the custom-house; you don't know who is the man who does it?

A. I do not; no, sir.

Q. You don't know who was the man that did it at this time?

A. No, sir; I do not.

Q. Is it any part of your official occupation to have any concern in that matter?

A. None whatever. I simply administer the oath to those who bring the notices as designated by the collector.

Q. And so far as that is concerned you do that no matter which deputy collector signs them?

A. I would.

Q. And no matter whether the collector is there or absent?

A. No, sir.

Q. Do you know whether a record is kept of the names of people who are eligible for appointment as merchant appraisers?

A. I do not.

Plaintiffs' counsel then recalled JAMES CRAWFORD MCCREERY, who testified:

I did not apply to be appointed merchant appraiser in this case. I never passed a civil-service examination. I received five dollars a day for the services I rendered down there without any regard to
100 whether I acted upon one or upon ten reappraisement cases. That is all I got. I do not remember how many cases I acted upon on that day.

Being cross-examined, he said:

In this particular case I probably got about $1.10 or some other fraction. I know that on or about that time it was very rare that my appointment came up with only one invoice on it. I have a distinct recollection of that fact.

Being redirectly examined by plaintiffs' counsel:

Q. I find a memorandum on the back of the paper signed by you corresponding to your recollection of about a dollar and a quarter. Does not that indicate to your mind that you had that day some other reappraisements—as many reappraisements as $1.25 would go into $5?

A. Probably.

Q. At least that number?
A. At least.

Plaintiffs' counsel then offered in evidence the classification of employees in the classified customs service as certified to by the Secretary of the Treasury under Revised Statutes, section 882, being the classification provided for by section 6 of the act of Congress approved January 16th, 1883.

Defendant's counsel objected to the same as incompetent, immaterial, and irrelevant; and the court sustained the objection, and plaintiffs' counsel duly excepted.

The following is so much of said classification as is needful to be here recited. No objection was made to the authentication of the certificate:

101 *Classification of Employees at the Civil-Service Customs Ports.*

Class A. All persons not employed merely as laborers or workmen receiving a compensation amounting to nine hundred dollars or more, but less than twelve hundred dollars per annum.

Class 1. All persons receiving a compensation amounting to twelve hundred dollars or more, but less than fourteen hundred dollars per annum.

Class 2. All persons receiving a compensation amounting to fourteen hundred dollars or more, but less than sixteen hundred dollars per annum.

Class 3. All persons receiving a compensation amounting to sixteen hundred dollars or more, but less than eighteen hundred dollars per annum.

Class 4. All persons receiving a compensation amounting to eighteen hundred dollars or more, but not including any officers confirmed by the Senate.

Plaintiffs' counsel offered to show that this merchant appraiser was not appointed under the civil-service rules under the act of 1883. The court excluded the evidence and plaintiffs' counsel duly excepted.

102 Plaintiffs' counsel then recalled HARRY ROBINSON:

I remember the occasion on April 8th in reference to this particular importation when it was up for consideration before Mr. Brower and Mr. McCreery. They sat in the general appraiser's room in the public store. That room is situated on the third floor of the building, furnished with a long table, at the head of which the general appraiser sits, and the merchant appraiser sits at one hand. It is accessible for the public to persons having business there through a door connecting it with the chief clerk's room. It also opens into the room in which the goods are examined by the reappraising officers. Over that door there is a notice that no broker or importer shall be allowed in the room excepting the examiner, witnesses, and the merchant appraiser. I was not present when the witnesses

whose depositions have been produced here examined the goods; did not see any witnesses look at our goods, to the best of my knowledge; did not receive any information whatever from the defendant as collector as to who was appointed to appraise our goods; first learned officially who the board were when I was called in by the appraisers about 11.30 or twelve o'clock on April 8th. I was in the outside room where the chief clerk's office was. The door into the general appraiser's room was closed, to the best of my recollection.

I had no official knowledge of what was going on in there.
103 When I went in my goods were not in the room where Mr. McCreery and Mr. Brower were. I was not present when they took the depositions of Mr. Roberts, Mr. Bechner, and Mr. Horand. I believe the examiner was there when I was there, but I did not hear his statement. I think it was made after I left. That I don't know.

Q. Were your goods examined by Mr. Brower in your presence?

A. No, sir; Mr. McCreery had samples of them. Mr. Brower asked me for my statement in the case. I made a statement. Mr. Brower then told me I could go. That is all the proceeding at the reappraisement that I had official knowledge of; I have gone through with that process many times. My attention had been called on previous occasions to the exclusion of the importer from the reappraisement proceedings. I had noticed it by the circular letter of the Secretary of the Treasury, and also by the action of other merchants and myself in cases where we had asked to be present, and had been refused under that letter. I do not know whether I had asked Mr. Brower or another general appraiser, but I had before asked some general appraiser in that room to be allowed to be present. That adjoining room is the room next to the appraiser's in which the goods are placed in their cases and taken from their cases and put onto a counter where the witnesses examine them; and, as I said before, there is a notice on the door prohibiting any one not having business there from entering and examining the goods;

and you are told, and I have been told by the watchman
104 when my cases have been on and I have gone there, that I was not allowed in there. In respect to my exclusion from the proceedings, that had occurred before. According to the custom that prevailed at that time, I would not have been allowed to be in that room when the witnesses were examining the goods. The official watchman would have excluded me. We are not allowed in there in our own cases.

Q. You are in there most every day and know what is allowed and what is not?

A. Yes, sir.

Q. And on this particular occasion you were not present on the reappraisement, except as you have stated?

A. Except as I have stated.

Being cross-examined by defendant's counsel, witness responded:

Q. Where were the samples of plaintiffs' goods at the time you were up there at the appraiser's office?

A. The samples of the goods that Mr. McCreery had?
Q. Yes.
A. They were on the table before him.
Q. On the table before him?
A. To the best of my recollection.
Q. Where was that table?
A. That table was in the center of this room; the table at which I have described the appraiser sitting at the head.
Q. Did you go into that room to make your statement?
A. I did.
Q. And the samples were there?
A. Some samples were there.
Q. And the cases of goods were in the other room where they were generally kept?
A. Yes, sir.

Q. Did you make any objection at the time that your goods
105 were not being examined?

Objected to by plaintiffs' counsel as immaterial. Objection overruled. Plaintiffs' counsel duly excepted.

Q. There was no question of that kind raised at that time?
A. No, sir; it was the mere question of how much they were worth.
Q. That was the subject of discussion there?
A. That is what I was asked to state.
Q. Did you take those samples in your hand at that time?
A. No, sir.
Q. You often went into this other room to examine goods yourself, didn't you?
A. Yes, sir.
Q. It is well known among the people who do business there where these goods are kept?
A. Yes, sir.
Q. Were you ever refused admittance there when the witnesses were in there?
A. The rule in force at that time was that I was not allowed in when the witnesses were there. At other times I have gone in to examine other people's goods, but not our own. I had already sworn to the value. What I said when I went in there to make my statement on this reappraisement was that we had entered at what we considered full market value; we thought the goods were as high as they ought to be, and we had entered in accordance with the previous invoice we had passed from the same manufacturer at the same place. I was allowed to make a full statement concerning the value of our goods. The wit-
nesses who signed these depositions were not in the
106 room at the time. They must have been in the adjoining room to get into that room. I have no present recollection of having seen them there, but they must have been there to go into the other room. I have been a witness on these reappraisements myself often; am acquainted with the manner of

doing business there on reappraisement. These witnesses that are called are furnished with a blank by the appraiser's clerk; then they pass in and examine the goods; then they figure up their value and sign and swear to this blue paper—this form.

Q. And that is all the examination there is of the witnesses so called?

A. Not always.

Q. Well, generally as to experts?

A. Sometimes they are specially sworn.

Q. What is done with these papers after they are signed and sworn to?

A. Sometimes you are asked how you got at those values.

Q. Sometimes the appraising board asks that?

A. Yes, sir; the majority of times they do not. The witnesses just pass those papers in to the board and they are sworn.

Q. So that in the majority of instances there is no examination of these men who make these depositions by the appraising board as witnesses?

A. In many instances, no; I can't say as to others.

(After some testimony describing a diagram of the appraiser's premises the witness resumed:)

At the time of the reappraisement the goods are in the custody of the custom-house officers and are sent there for the purpose of being examined.

107 Q. Did you make any objection of any kind at the time of this reappraisal to the merchant appraiser?

Objected to by plaintiffs' counsel that the witness didn't know who the merchant appraiser was when he got there. It is not necessary to make any objection there. You can protest afterwards.

The COURT: He can tell what happened.

Plaintiffs' counsel objected to this as immaterial, irrelevant, and incompetent; which objection being overruled, plaintiffs' counsel duly excepted.

A. I made my statement to Mr. McCreery and Mr. Brower.

Q. About the goods?

A. Making no objection to either of them.

Q. Did you make any objection to Mr. McCreery?

A. I did; I signed a protest.

Q. That was after the reappraisement that you protested?

The COURT: I don't understand that he says that.

Q. I am asking.

A. Whenever there was an advance made by the appraiser I then sent a notice to the counsel to protest, and I notify him whether I have called any reappraisement or not. I protested against the original appraisement and reappraisement.

Q. Do you mean to say that you protested against the reappraisement before the reappraisement took place?

A. I mean to say that I notified the counsel to protest.

Q. Before the reappraisement took place?

A. I notified them that there is one to take place and to protest against it.

108 Q. Against the reappraisement?

A. Yes, sir.

Q. Before reappraisement takes place?

A. I notify them before the reappraisement takes place. I have stated all that took place before this board of reappraising officers.

Q. Have you stated everything that you requested there?

A. I requested that the invoice be returned in accordance with my entry. I do not recollect that I was in the appraiser's office for more than five minutes, if it was that. The chief clerk, having been called in, came out and informed me that I was wanted by Mr. Brower. I went in there and found Mr. McCreery sitting with him on this invoice. I am acquainted with Mr. McCreery only in a general way, and have known him in a general way perhaps a year and a half. I have seen him there a great many times; that is the only way I have known him. Mr. Brower, or whoever is the general appraiser, rings the bell, and the chief clerk then goes in and then comes out and says: "Auffmordt't man is wanted." I happened to be there because I was sent a notice that a reappraisement was to take place on my goods. I received that notice the day before.

Being redirectly examined by plaintiffs' counsel, he said:

Q. Your goods, I understood you to say, were in the adjoining room?

A. Yes, sir.

Q. Did you go in there to see whether your goods were in there or not at the time you were called in there by Mr. Brower?

A. No, sir. I do not know that the samples that Mr. Mc-

109 Creery had were samples from the particular cases 172, 173, and 174. As a matter of fact, I could not get into that other room where these goods were when I was not called as a witness on other people's cases unless I went in by the favor of some subordinate in charge. The watchman will put you out if you go in. There is a watchman.

Q. In your statement you referred, you say, to other invoices that had been passed at the same price as this. What do you mean by passed?

A. I am not certain now whether by the examiner or reappraising officers; but previously had been passed at those prices.

Q. By passed you mean had been appraised at that price?

A. Yes, sir; and I tried to get my goods at the prices I previously had accepted and passed, and I explained that. I had no official means of knowing how or when or where witnesses examined our goods or whether they did ever examine them at all or not. Neither did I have any means of knowing whether the witnesses who assumed to depose did in fact know anything about the market value of goods of this kind in the principal markets of Switzerland.

Q. These papers that my friend has shown, being the so-called

depositions of the witnesses or schedules—did you see those schedules at the time you were called into the room?

A. They were not shown to me. The notice I say I received was from Mr. Brower. That notice did not indicate who the board were; said nothing on that subject.

Q. Do you not know it to be a fact that witnesses are frequently examined there orally?

A. Yes, sir.

Q. And that what they say is reported in short-hand?

110 A. I have no personal experience.

Q. Haven't you seen that done?

A. I have seen that done: have seen it done there in our own previous cases. We have had cases there before this time.

Q. And you have been present when that was done lately?

A. Not lately; no, sir.

Plaintiffs then called WILLIAM KENT, who, being duly sworn, testified:

I am one of the assistant appraisers appointed by the President and confirmed by the Senate; have charge of the appraising of silks, satins, laces, embroideries, ribbons. I have been served with a *subpœna duces tecum* to produce reports received by the appraiser from persons employed by the United States located in Switzerland touching the values of silk and cotton satins that were received by the appraiser during the months of March and April, 1886. I produce such papers, and find among them reference to a certain importation of C. A. Auffmordt & Company of such goods from Ruti, shipped in March, 1886, and referring to cases marked H. Z. 172, 173, and 174. This paper was received in the usual and ordinary course of business.

Q. Was the paper which you have just produced received by you before you acted upon a certain invoice by the steamship Main of cases marked 172, 173, and 174, imported by Auffmordt & Company?

A. It is impossible to say. We get these goods in batches. Sometimes they arrive before the goods are passed and sometimes

111 afterwards. I have no means of knowing whether this was or not.

Q. Do you know whether or not you have received papers relating to some of these goods from the same concern at or about the time these goods were passed?

A. No doubt about that.

Q. And some such papers were received before they were passed?

A. Some before and some after.

Q. Will you please state what purpose in the usual course of business relating to appraisements these paper such as you produce fulfil, either under the instructions of the Secretary of the Treasury or otherwise? What do they fulfil, as far as your action is concerned?

Objected to by defendant's counsel as immaterial, irrelevant, and incompetent.

Plaintiffs' counsel then stated: We propose to follow this up, and expect to show that, under the instruction of the Secretary of the Treasury, stated reports are made upon every shipment from every place in Europe touching certain classes of goods by people employed by the Secretary of the Treasury for that purpose; that those statements are sent to the appraiser for the purpose of affecting the appraiser's appraisement, and that the appraisers have received instructions from the Government in some cases to follow those figures, and that instead of exercising their own judgment (by their judgment I mean the judgment of the appraisers themselves or the assistant appraiser or the examiner of the general appraiser or anybody having official duties in the matter)
112 *that instead of exercising their own judgment* they are under stress to act in accordance with this schedule; that, as a matter of fact, the appraisements as now conducted are not appraisements made upon the unbiased judgment of the officers to whom by the statute the high function of appraisement is delegated. On the contrary, the men who in fact fix the value and hence the rate or amount of duty are people employed by the Government to go abroad and make calculations as to cost. Now, we want to bring that circumstance before the court in some proper way and to such an extent of proof as will be sufficient to address the court upon the law. Counsel then repeated the question:

Q. Will you please state what purpose in the usual course of business relating to appraisements these papers such as you produce fulfil, either under the instructions of the Secretary of the Treasury or otherwise? What do they fulfil, so far as your action is concerned? Will you please state what purpose, so far as your official action is concerned or the official action of your subordinates—what purpose is fulfilled by these expert or so-called expert documents similar to that which you now produce and which you say you received?

Objected to by defendant's counsel as irrelevant, immaterial, and incompetent.

Mr. PLATT: These are merely consular documents, as I understand it, from consuls abroad as to the value of such classes of goods
113 sent on from time to time. This gentleman is not one of the reappraising officers at all.

The COURT: He is the first appraiser.

The DISTRICT ATTORNEY: Are you attacking the first appraisement?

PLAINTIFFS' COUNSEL: Yes, indeed; we are.

The COURT: The point is, I understand, this witness was called in upon the second appraisement.

Mr. PLATT: This witness was not even present at the second appraisement.

The COURT: He is the assistant appraiser.

PLAINTIFFS' COUNSEL: He is commissioned by the President as assistant appraiser. There are ten of them. The examiner does nothing but assist in reappraisal, and he is a subordinate of Mr.

Kent, the assistant appraiser. Now, whatever the examiner does is under the direction of Mr. Kent.

The COURT: I see now. Your inquiry is, What was going on in the mind of the appraiser on the first appraisal? That is too remote. If you had rested on that and not taken your appeal perhaps that would have been opened; but when you were dissatisfied with the appraisal and took an appeal, then you became entitled to a good reappraisal. If you got that all right, and if you did not that isn't good for anything, but I don't think you can go back and examine the original appraisal after you have taken your appeal; so leave that all out.

114 PLAINTIFFS' COUNSEL: Suppose these documents were long before reappraisal.

The COURT: When you offer them we will see about it. You are asking about what inference was in his mind. Leave it out.

Plaintiffs' counsel duly excepted.

Q. Who was the examiner who assisted you in these goods?

A. The examiner of this particular invoice was Mr. Fenton. He is not now living. In the usual and ordinary course of business the papers similar to this I now produce, as received from abroad, are handed over by me to the examiners in charge of that class of goods. In respect to Mr. Fenton, I don't know whether this paper produced by me was passed to him. I got it out of a pigeon-hole in the examining-room of Mr. Corbett, who has the same class of goods, but did not have them at that time.

Q. When the examiners are called before the reappraisement board to make their statement what is the usual course of practice, so far as you know, in respect to taking with them these expert statements?

Objected to by defendant's counsel as immaterial and irrelevant.

The court excluded the evidence, and plaintiffs' counsel duly excepted.

The paper produced by the witness and just described, being this schedule from abroad, was marked for identification. Plain-

115 tiffs' Exhibit No. 14, and upon being shown to the witness he was asked:

Q. This paper which you produce has special reference in it to this particular importation, has it not?

A. This is an invoice which is called for in that paper.

Plaintiffs' counsel then offered in evidence the paper which has been identified by the witness, being the paper just marked Exhibit No. 14.

Defendant's counsel objected, and the court sustained the objection and excluded the said paper from evidence; whereupon plaintiffs' counsel duly excepted.

116 This excluded paper marked Exhibit No. 14 is as follows:

UNITED STATES CONSULATE,
HORGEN, 25 *February*, 1886.

To the collector of customs, New York.

SIR: Permit me to call your attention to the following memoranda of Mr. John Schmid, a government silk expert for this district, concerning certain undervaluations of merchandise described in invoice No. 213 of this consulate. Samples of the goods, as well as a calculation showing the basis of the expert's conclusions, are enclosed.

I am, sir, your obedient servant,

WILLIAM T. RICE,
U. S. Consul.

HORGEN, SWITZERLAND, 25 *February*, 1886.

To the United States consul at Horgen.

SIR: Following please find calculations showing an undervaluation in the value of merchandise covered by invoice No. 213, shipped by Mechanical Silk-Weaving Establishment, Ruti, to C. A. Auffmordt & Co., New York. According to my calculations the goods
117 described in this invoice could not be made in this district for the prices at which they are invoiced. I leave out of the calculation entirely all costs for packing, freight, insurance, and commissions, as well as allowances for profits, my aim being to report only the absolute cost of producing such goods here in the factory.

Yours respectfully, JOHN SCHMID,
Silk Expert.

MEMORANDA.—Invoice No. 213. Total of invoice, frs. 624,950; raised amount, frs. 6971.75; case, H Z 173; piece, 6161–84; length, om. 1336–7; width, 46; em. price, frs. 1.25; raised price, frs. 1.30.

118 *Calculation.*

	Lbs.	Cs.	Frs.	Cts.
Organzine	1	70 à frs.	24	40.80
* * * *	*	*	*	
Tram				
Cotton yarn	6	20	2	12.40
Cost of coloring the organzine, the tram, cotton yarn	7	90	1.60	12.65
" winding the organzine	1	70	2	3.40
" " " tram				
" warping				2.30
" weaving				12
" finishing, ironing, &c.				8
Am. 86, p. 106				91.55

To add. 19%, 130.

United States consulate, Horgen, Switzerland.

Recapitulation.

Case. No.										
H Z 172	6119	142	Am.,	1,008.2	Satin,	92	Em.,	260		
	6143	60	"	787.6	"	96	"	265		
			Am.,	1,796					25	Francs. Cts. 449
173	6161	84	Am.,	1,336.7	Satin,	46		1.15	15	200.50
	6185	88	"	223.3	"	46		1.60	20	44.65
174	6189	13	"	1,347.7	Gauff,	46		1.25	15	202
										896.15
Short measure, 7 p.										4.50
										891.65
Discount, 19 %										169.40
Difference										722.25
Amount of invoice										6,249.50
Raised amount, francs										6,971.75

119 United States consulate, Horgen, Switzerland.

[Endorsed:] Report of silk expert on invoice No. 213 of Horgen consulate, February 25, 1886. C. A. Auffmordt & Co.

120 Plaintiffs' counsel then recalled Harry Robinson, and, the entry having been shown to witness, he said: I find the cashier's check of payment—April 21st, 1886—upon that entry. There is also marked upon it increased duty, April 21st, 1886, which refers to the same thing. The entry was reliquidated for error on the 21st of June, and the additional duty was paid on the 30th of June.

Plaintiffs' counsel then offered in evidence the invoice which is attached to the paper, which is already marked for identification Plaintiffs' Exhibit No. 5. The invoice was received and marked Plaintiffs' Exhibit No. 15, and is as follows:

121 PL'FFS' EXHIBIT No. 15.

3. P. 3–15.

Duplicate. Ruti, Zurich, den 24th February, 1886.

No. 213. P. 315.

Herren C. A. Auffmordt & Cie., New York, Sollen an die. 34394.

Mechaniche Seidenweberei, Ruti.

Senden Ihnen auf. Ihre Rechnung & Gefahr durch der Kopstadt & Treichler, in Havre, Zahlbar, 9389.

(Mechanical Silk-Weaving Establishment, Ruti:

We forward to you or your account and risk, through Kopstadt & Treichler, at Havre. Payable.)

N. Y. cat. No.: 541. Penalty. H. R.
Invoice No.: 9389.
Advanced 12.60 per centum.
P. on all.

H. E. ESTERBROOK,
Chief Amendment Clerk.

Importer notified March 22, 1886.

J. R. H., *Clerk.*

Add to value—

H Z	172	1008^{2}	26045	453.71
		787^{6}	21545	354.49
	173	1336^{7}	11520	267.38
		223^{3}	16035	78.18
	174	1347^{7}	12515	202.18
				1,355.94
			$\frac{1}{1}$ $\frac{1}{2}$%	6.78
				1,349.16
			$\frac{1}{1}$ 19%	256.36
			Frs.	1,092.80

122 (Reclamationen, wenn nicht innert 8 Sagen nach Empfang der Waare gemacht, bleiben unberucksichtigt.)
(Claims not presented within eight days after the receipt of the goods will receive no attention.)

No. 114½ C. m. and —

H Z No. 172 1 C.

6119	42		brutkos 202, Nettokos 164.3.
20	41	6	boutre.
21	42	6	"
22	42	2	havane, Imperfections.
23	42	3	mode, "
24	42	5	" "
25	42	6	Ecru.
26	42	5	"
27	42	2	Cardinal, "
28	42	2	" piece dyed.
29	42	4	marnie, "
32	41	5	" very bad piece Tob.
31	42	2	"
32	42	2	" Imperfections.
33	42		"
34	41	6	grenat.
35	40	3	"
36	41	2	"
37	42		" 4–8 and Stains.
38	41	6	"
20 p'ces,	841	⅜	

123 No. 114½ and —

20 p'ces,	841	3–8	Transport.	
6,139	41	4	noir-bleute.	
40	41	2	"	
41	42	1	"	
42	42	7	"	
24 p'ces,	1008	⅛	Satin mi. soie cotton back avr. 20 c. pa., piece dyed, 97 c-m. a fs. 260	fs. 2,621 45
6143	42	5	Cardinal.	
44	47	1	"	
45	42	7	grenat.	
46	42	6	"	
47	42	2	"	
48	47		navy.	
49	42		" piece dyed.	
50	42		"	
51	43	2	"	
52	41	7	"	
53	41	5	creme.	
54	41	7	beige—very bad piece job.	
55	50	7	havane.	
56	42	1	mode.	
57	50	5	seal.	
58	41	5	brun clair.	
59	43		"	
60	42	2	"	
18 p'ces,	787	⅛	Satin mi. soie cotton back a'r. 15 cts., 10 V., piece dyed, 96 c–m. a fs. 215	fs. 1,693 65
				fs. 4,315 10
Short measure, ½%				21 60
				fs. 4,293 50
Discount, 19%				815 75
				fs. 3,477 75

Tare, s. No. 6136⅛ and a 260 fs. 130, transport, fs. 3,477.75.

124 No. 114½ and —

Transport.

Rabais, s., fs. 130 ---------- fs. 3,477 75

114½ No. 6121 6122 6123 6127

an- 42⅝ 42⅜ 42⅛ 42⅜ au
169⅝ 10 C. 16 ⁹⁵⁄₈=10c. ---- 1,695

No. 6129 6132 6133

and 42⅛ 42⅜ 42 and 126⅛ 30 38

No. 6130 6154

and 41⅝ 41⅞ and 83¼, 50 41 75

98 1

Short measure, ½% ---------- 50

97 50

Discount, 19% ---------- 18 50 79

fs. 3,398 75

H Z No. 173 1 C.

Bruttokos, 905; nettokos, 73–4.

6161	55	ciel ⅜ and Stains.
62	55	"
63	55 4	"
64	55 7	" 27 " "
65	55 3	Coquelicot.
66	55 4	"
67	56	"
68	55 6	" ⅜ and Stains.
69	55 7	Cardinal 1⅛ and Stains piece dyed.
70	55 5	"
71	55 6	" Imperfections.
72	55 2	"
73	55 6	Cardinal 2⅜ and Stains.
74	55 5	"
75	55 2	" ⅜ " "
76	55 3	" Imperfections.
77	56 6	beige.
78	56 5	beige.
79	56 2	"
19 p'ces,	1058⅛	

Transport ---------- 3,398 75

125 No. 114½ and—

19 p'ces, 1058 ½ Transport ..... fs. 3,398 75
6180 56 beige.
81 56 3 orange. Imperfections.
82 n 55 "
83 54 7 "
84 56 4 " dyed.

24 p'ces, 1336 ½ Satin mi soie cotton back.
Add 10 ct. to am'nt.
Piece dyed 46 c–m á fs. 1 15, fs..... 1,537 40
6185 55 3 blanc ⅜ and stains.
86 55 4 " ⅜ " piece.
87 56 2 " Imperfections.
88 56 2 "

4 p'ces 223 ⅜ Satin mosoi cotton back 10c.
Piece dyed 46 c-m á fs. 1 60, 10c..... 357 40

1,894 80
Short measure, ½% 9 45

1,885 35
Discount, 19% 358 20

Tare: Fs. 1,527 15
No. 6161 6164 6167 6168 6173 6174
⅜ ⅜ ⅜ ⅛ ⅛ ⅛ and
and 3⅜ 115 fs. 4.30.
No. 6185 6186
⅜ ⅜ aú ⅛ 160 80

Rabais s.:
No. 6171 6176
55⅜ 55⅜ aú 111¼ 05 ..... 5 55
and 56⅜, 10c. ... 5 60
No. 6187
No. 6181 6184 and 112⅞, 20c. .. 22 55
56⅜ 56⅛ 38 80
Short measure, ½% 20

38 60
Discount, 19% 7 35
31 25
1,495 90

Transport..... fs. 4,894 65

126 No. 114½ and —.

Transport.

H Z No. 174 1 C.

fs. 4,894 65

Bruttokos, 96–5; netkos, 66.

6189	54	1	grenat.	
90	54	2	"	
91	54		"	⅛ and Stains.
92	53	6	"	
93	54		"	
94	54	2	"	⅛ " "
95	53	4	"	
96	53	2	"	⅛ " "
97	53	6	"	
98	54			
99	53	6	"	⅛ " "
200	53	5	"	piece dyed.
01	54	2	"	
02	54	5	"	⅛ and Stains.
03	54		"	
04	54	2	"	
05	54	4	"	
06	53	1	"	⅛ " "
07	53	2	"	
08	53	6	"	
09	53	4	"	
10	54	2	"	
11	53	6	"	
12	54	1	"	
13	54	2	"	

Add 10c & p'r anne.

25 p'ces, 1347⅞ Satin mi. soie gauffree cotton back piece dyed.

46 c. m a fs. 125	fs. 1,684 85	
Short measure, ½%	8 40	
	fs. 1,684 85	
Discount, 19%	318 55	
Transport	fs. 1,357 90	4,894 65

127

Transport	6249.50 272.30 5977.20 1092.80 70.70	fr. 1,357.90	fr. 4,894 65

Tare, 2.

No. 6191	6194	6196	6199	6202	6206
On ⅛	⅛	⅛	⅛	⅛	⅛

On 3 a 1.25		fr. 3 75	
Discount, 19%		70	
		3 05	
			1,354 85
			frs. 6,249 50

Sixty-two hundred forty-nine ..... 50 ru.
Add for bal., less ch., 2.72 30
1,092.80

De'gnated 4, 20, '86. Eac-.

(Paid Mar. 15, 1886. Sixth division.)

Liquidated. Add ch., $42.00.

The above prices included the following costs:

H Z 172, 173, 174:

Expenses for paper cases & packing, fr. 68.70, fr. 30.75, fr. 32.80	fr. 132 25
Carriage to shipping port, fr. 72.70, fr. 32.6, fr. 34.75	140 05
Total	frs. 272 30

Recapitulation.

H Z No. 172	1 C		fr. 4,293 50
" " 173	1 "		1,885 35
" " 174	1 "		1,676 45
	3 C		fr. 7,855 30
Discount			frs. 815 75
"			358 20
"			318 55
"			frs. 1,492 50
Tares, rabais		fr. 79	fr. 3,398 75
" "		31 25	1,495 90
" "		3 05	1,354 85
		fr. 113 30	fr. 6,249 50

Mechanische Seidenweberei, Ruti.
(Mechanical Silk-Weaving Establishment, Ruti.)
E. KRAMER.

I certify that this invoice was presented to me on entry S. S. Main, custom-house, New York, this 13 day Mar., 1886.
10 r-app. 173. 4002.
Or mak.—22 (O. Rols).

C. O. ROCKWELL, *D.*

Case H Z #173.

Mf. silk & cotton, s. c. v. 50%. Bal. same. Add as noted, less inv. disc't, to make m'k't value & in add. to imp's add'n for value. Add to make m'k't value of goods, *per se*, 272.30 frs. The correct value of this invoice is 70.70 frs., plus add'n for value.
(W.) M'ch 18, '86.

A. D. T., *W.*
E. A. BROWER.

Currency francs.
Reapp. on all advances approved.

LEWIS McMULLEN, *Appraiser.*

128 Plaintiffs' counsel then offered the papers attached to the invoice, including the paper marked for identification Plaintiffs' Exhibit No. 5, being the consular certificate and declaration attached to the custom-house invoice, and also the report or reappraisement signed by George V. Brower and J. C. McCreery.
These papers are as follows:

129 *Declaration.*

Form No. 139, Zu gebranchen, wenn die Waare nicht gekauft oder verkauft wurde.
(Form No. 139, to be used in the case the goods were not purchased or sold.)

I, J. E. Kramer, do solemnly and truly declare that I am the manufacturer of the goods, wares, and merchandise in the within invoice mentioned and described; that the said invoice is in all respects true; that it contains a true and full statement of the actual market value of such of said goods, wares, and merchandise as are subject to any ad valorem rate of duty, or to any duty regulated or directed by law to be estimated, or based upon the value of the square yard, or of any other specified quantity or parcel, at the time and place when and where the same were manufactured or procured, of the actual quantity of said goods, wares, and merchandise, and of all charges thereon; that no discounts, bounties, or drawbacks are contained in said invoice except such as have been actually allowed thereon; and that no invoice different from the one now produced has been or will be furnished to any one.
I further declare that it is intended to make entry of the said goods, wares, and merchandise at the port of New York, in the United States of America.

J. E. KRAMER.

Signed in triplitate, at (Ort) Ruti, of and for (von und für
130 has haus) this (datum) 24 Februar, 1886. Mechanische Seidenveberei, Ruti (Mechanical Silk-Weaving Establishment, Ruti).

Obiges endossement ist mit Ausnahme der No. vom Austeller der Faktura auszufullen. Siche Ruckseite.

(The above endorsement, with the exception of the number, is to be filled out by the maker of the invoice. See other side.)

131 Form 140.

Consular Certificate.

I, William T. Rice, consul of the United States of America at Horgen, do hereby certify that on this 25th day of February, A. D. 1886, the within invoice, numbered 213, in which are mentioned and described certain goods, wares, and merchandise to the amount of francs 6,249.50, was produced to me by the subscriber of the foregoing declaration, who thereupon declared that it was intended to make entry of said goods in the United States of America.

I do further certify that I am satisfied that the person making the declaration hereunto annexed is the person he represents himself to be, and that the actual values or manufactured prices of the goods, wares, and merchandise described in the said invoice in the principal markets of the country at the time of exportation are correct and true, except as charged by the report of the silk expert appointed for this consulate.

Witness my hand and seal of office, at Horgen, the day and year aforesaid.

[L. S.] WILLIAM T. RICE,
U. S. Consul.

Fee paid, $2.50.

132 (Endorsed:) Horgen, U. S. consulate. Invoice No. 213. * * * Receiver, C. A. Auffmordt & Ci. Shipper, "Mechanische Seidenweberei, Ruti" (Mechanical Silk-Weaving Establishment, Ruti). Contents, silks. Amount, fcs. 6,249.50. Marks, H Z No. 172, 173, 174. Port of entry, New York. Destination, New York. * * *

The following is the reappraisement paper above mentioned and hereinbefore referred to as Plaintiffs' Exhibit No. 5.

133 *N. Y. Cat. No. 1037a.*

34934. (For iden., No. 5. J. H. F.) 9389.

P. M'ch 15, 1886.

PORT OF NEW YORK,
GENERAL APPRAISER'S OFFICE, *Apr. 8th*, 1886.

SIR: We have examined a lot of silk & cotton satins imported by C. A. Auffmordt & Co. in the S. S. "Main," from Ruti, Feb'y 24,

1886, and do hereby certify that, in your opinion, the actual market value or wholesale price of the said goods, at the period of the exportation thereof to the United States, in the principal markets of the country from which the same were imported into the United States was, and we do therefore appraise the same, as follows:

Marks.	Numbers.	Description of merchandise.	Per anne.	Francs.	Total value.
H Z	172-4	Three cases silk & cotton satins.			
	172	Vanons Noo 24 p'ces satin mi soie cot. back 97 c-m annes	1,008⅛	3.25	3,276 81
	172	" " 18 "	787½	2.75	2,166 31
	173	" " 24 "	1,336⅞	1.45	1,938 47
	173	" " 4 "	223⅛	2.05	457 92
	174	" " 25 "	1,347½	1.50	2,021 81
		Francs			9,861 32
		Tares & rabais			140 55
		Francs			9,720 77
		Short measure, —%			38 77
		Francs			9,682
		Dis't, 19%			1,839 60
		Francs			7,842 40
		Less charges			272 30
		Francs			7,510 10

M. J. W.
Examined Ap'l 10, 1886.
Advance not 10%.
To be added as per reappraisement. D.
J. S.
Not em. 7.60 francs.

J. C. M. CREERY,
Merchant Appraiser.
GEO. V. BROWER,
General Appraiser.

134 (Endorsed:) N. Y. cat. No. 1037*a*. Port of New York' general appraiser's office, April 8, 1886. G. V. Brower, general appraiser. Liquidated report on reappraisement of silk & cotton satins imported by C. A. Auffmordt & Co., per S. S. "Main," from Ruti. Advance on inv. as raised by imp't. 9389. Auffmordt & Co., Main. Mar., '86.

135 Plaintiffs' counsel then offered in evidence the paper marked for identification Plaintiffs' Exhibit No. 4, being the oath of Mr. McCreery, which, being received, reads as follows:

PL'FFS' EXHIBIT No. 4.

N. Y. Cat. No. 5. 9389.

Merchant Appraiser's Oath.

CUSTOM-HOUSE, NEW YORK,
COLLECTOR'S OFFICE, *April* —, 1886.

I, the undersigned, appointed by the collector of the district of New York to appraise a lot of manufactures of silk and cotton imported per steamship Main from Bremen, the importer having requested a new appraisement thereof in accordance with law, do hereby solemnly swear diligently and faithfully to examine and inspect said lot of manufactures of silk and cotton and truly to report, to the best of my knowledge and belief, the actual market value or wholesale price thereof at the period of the exportation of the same to the United States in the principal markets of the country from which the same was imported into the United States, in conformity with the provisions of the several acts of Congress providing
136 for and regulating the appraisement of imported merchandise, so help me God.

J. C. M'CREERY.

Sworn to and subscribed before me this 8th day of April, 1886.
(Signed) W. A. JONES,
D. Collector.

Plaintiffs' counsel then offered in evidence the entry marked Plaintiffs' Exhibit No. 16, which is as follows:

PLAINTIFFS' EXHIBIT No. 16.

This entry is in the usual statutory form, and as to the packages in question is verified by the importer taking the statutory oath thereon as prescribed for consignees. The contents of this entry are sufficiently described in the foregoing testimony of the witness Robinson, and need not be further recited.

137 Mr. TREMAIN: I have here another protest and appeal, filed June 30th, testified to. The original is now here produced by the defendant in answer to our notice, and we offer it in evidence for what it may be worth.

Mr. PLATT: We object to that as immaterial, irrelevant, and as not included in this suit nor in the bill of particulars in the action.

The COURT: What is the paper?

Mr. PLATT: It is the third protest.

Mr. TREMAIN: It is the fourth protest. It is a paper filed by the collector on the 30th of June, 1886, which by the testimony yesterday was lodged one for the collector and one for the Secretary of the Treasury, in the usual way referring to this importation among others. I offer it in this light. I suppose whatever the statute may

require in respect to protest does not debar a party in an action at all from proving just as many other items as to which he protested as he may.

The COURT: What does this protest relate to?

Mr. TREMAIN: This relates to the additions.

The COURT: Was there an addition in June?

Mr. TREMAIN: This protest relates to any addition of any kind whatever on this particular importation. It is the same form as the others.

The COURT: What is the object of that?

138 Mr. TREMAIN: The object of the protest was, in any event (whatever the Government was doing in regard to this entry), that there should be a protest on file.

The COURT: Was it within ten days after the June liquidation?

Mr. GREENWOOD: It was within ten days.

The COURT: That is admitted.

Mr. GREENWOOD: But wait a moment, your honor. This is not admissible under sec. 2931.

The COURT: Doesn't the bill of particulars set out this?

Mr. TREMAIN: No, sir.

Mr. GREENWOOD: Another objection is that from June 30th to the 3rd of August is only about thirty days. They have ten days after liquidation for their protest and thirty days for the appeal and ninety days for commencement of suit.

The COURT: Do I understand General Tremain to say that this item isn't in the bill of particulars?

Mr. TREMAIN: Our claim is, your honor, that we are entitled to give in evidence as many protests as we choose up to the time of the trial or the beginning of the suit. We want to show that the collector was continually notified. We offer it as bearing upon his information.

The COURT: That would be all very well, but if there is nothing about the June importation in the bill of particulars we will

139 leave it out. I can see no help we should get from trying things not in dispute. The bill of particulars shows that you claim a certain sum of money, I suppose.

Mr. TREMAIN: Yes, sir.

The COURT: That hasn't anything to do with this June liquidation, as I understand it.

Mr. TREMAIN: Yes, sir; it has.

The COURT: Do you so specify?

Mr. TREMAIN: A very large amount is claimed, but we care nothing about the amount.

The COURT: You show money enough in your bill of particulars; but that isn't it. I don't understand you that you have any item in the bill of particulars about the June liquidation.

Mr. TREMAIN: In answer to your honor I will say that the bill of particulars does not specify any item about liquidation, so to speak. The statute does not require anything of that kind to be put in the bill of particulars.

The COURT: Read what you have got in the bill of particulars that would cover this.

(Plaintiffs' counsel reads the bill of particulars.)

The COURT: I see nothing about June. We will leave that all out.

Mr. TREMAIN: Will your honor note an exception?

140 The COURT: This protest you offer was filed June 30th?

Mr. TREMAIN: Filed and dated June 30th.

The court allowed the exception. (The paper is marked for identification No. 17.)

This protest and appeal was substantially the same in form and contents as the others in evidence.

Plaintiffs' counsel then successively and separately offered in evidence each and every of the papers hereinbefore referred to as having been marked for identification by the numbers 7, 11, and 12, 8, 9, and 10, and comprising the records remaining in the office of General Appraiser Brower touching the reappraisement in question, including the original depositions of the witnesses sworn in respect to market value.

As each of said papers, the same having been duly proven, were so offered, defendant's counsel objected to the same as immaterial, irrelevant, and incompetent.

Mr. PLATT: I object to these as immaterial, irrelevant, and incompetent. They are the depositions of witnesses, with the exception of No. 7, which is what the witness calls a face paper. With that exception, they are all the depositions of witnesses taken before the reappraising board as to the value of the goods. They are inadmissible here, unless we are reviewing the value.

The COURT (to plaintiffs' counsel): What is the view in which you offer these?

141 Mr. TREMAIN: I offer them as part of the record of the proceedings before the reappraising board. I wish to show that they did take depositions of certain witnesses and that these are their depositions.

The COURT: We take the fact that they took depositions.

Mr. PLATT: That fact is already in.

The COURT: And also that these are the depositions. Now, are the contents of the depositions at all material?

Mrr. TREMAIN: They may become material as a matter of law.

The COURT: Upon what point?

Mr. TREMAIN: As showing that there was no lawful appraisement.

The COURT: In what respect? They might examine a witness and he would say so much, and they might think they were worth so much more, or they might examine a witness and he might put it away above what they thought was the value of the goods.

Mr. TREMAIN: Suppose the witness did not know anything about the market value of the goods, for instance, in St. Petersburg; he had never been there where they were bought and sold. Now, one question before your honor will be that they did not pursue the

statute in respect to the place as to which they took the market value; whether or not any conclusion that they arrived
142 at is a lawful one. We propose to argue that no ministerial officer, as the collector, is protected by the action of any other ministerial officer who doesn't act within his power, authority, and jurisdiction, and that if he goes beyond his power, or authority, or jurisdiction, or does anything in the course of his official performance that intrudes upon the statute directing what he shall do, that, then, it is no protection.

The COURT: Do you claim that there is any statute that prevents their taking depositions?

Mr. TREMAIN: Yes, sir. I claim that there is no statute that permits them to take a deposition of a witness who would not be a competent witness before a tribunal having that subject properly before its consideration.

The COURT: Do I understand you to say that if they took testimony that you think objectionable you can overthrow the appraisal in court?

Mr. TREMAIN: Not quite so far as that. If there were a tribunal having power to examine witnesses and inquire as to the market value, when this statute says that that value shall be the actual market value in the markets of the country of exportation and when there is no market value in that place, then the cost of production shall be ascertained; that under such circumstances, if the board of appraisers have power to examine witnesses, they
143 have no power to examine a witness who does not come within the class or title of those who are competent to say that they have some knowledge in respect to the actual market value in the place of exportation in the principal markets of the country whence they are exported, or have some knowledge in respect to that market; or, there being no market, that they do have some knowledge of the cost of production. If, therefore, they call before them a witness who never bought or sold, had no knowledge at all of the cost of production, and had no knowledge of the market value, and could not give any competent testimony whatever upon the subject, and who had never seen our goods, and who pretended to give his figures upon some other basis, the deposition of such a witness we would claim to be irregular.

Now, these witnesses never saw our goods, so far as we are concerned. We certainly have a right to show our goods if they were there.

The COURT: I think you are correct in that; but I think all this that you refer to should be disposed of in another way, and that is this: That they are supposed to weigh any testimony they take. If they call a man that turns out not to know anything about it when he comes there they pay no attention to what he says; just as if a witness called here upon the stand, being asked if he knows about a thing and he says he don't, then that is of no account and it all goes for nothing. I think the discretion is left in the board to weigh the proof. They weigh the proof and not we.

144 There is another view in which I think it might be proper

enough to look into the deposition, so far as to see that it had some materiality for the purpose of enabling you to raise the question, which you seem to be desirous of raising, as to the right of the importer to know what they do take for testimony. If it is shown that they did take some depositions, which, I should presume, are material, unless shown by the other side to be immaterial, I think that would enable you to raise your question.

Mr. PLATT: That is already in.

The COURT: It is in, but whether the depositions are material or not I don't know. I haven't looked at them to see.

Mr. TREMAIN: The depositions being offered and inspected by the court, this circumstance is of sufficient importance to be considered: That all of the depositions show the values to be concurrent with the importers' values and much less than the value arrived at by the appraising board. Now, whether the board acted under some other influence, as, for instance, the orders that were issued, is in part to be determined.

The COURT: What orders?

Mr. TREMAIN: The orders of the Secretary of the Treasury.

Mr. PLATT: The letter of June 9th?

145 The COURT: I don't call to mind any order which directs them to go on anything other than their own judgment.

(Mr. Tremain then read to the court the letter of the Secretary of the Treasury of June 9th, 1885, being No. 6957 of Treasury Regulations. See same above recited in this bill.)

The COURT: That is addressed to the appraiser?

Mr. TREMAIN: These are issued for the guidance of the officers of the customs, and the other regulation which I have read makes it the duty of the reappraisers to be governed by all of the rules and orders issued for the local appraisers. That is part of the law as held by your honor in the other case and part of the regulations of the Secretary.

The COURT: No; I haven't held that they acted under any instructions at all. Proving some regulations or letters of the Secretary of the Treasury don't go to prove that the appraiser didn't do his duty.

Mr. TREMAIN: I will be content to offer these depositions and take the benefit of an exception.

The COURT: Yes, sir; they object to the contents, and the contents are excluded. The fact that they had the depositions is already in.

Plaintiffs' counsel duly excepted.

The said depositions are all similar in form, giving the valuations of the deposing witness against each item of the invoice. Said

146 valuations substantially agreed in result with the plaintiffs' valuations as declared on entry.

Plaintiffs' counsel caused a separate exception to be noted to the ruling of the court excluding said depositions and each thereof from evidence, which exceptions were allowed accordingly.

Plaintiffs' counsel then called HANS WEHRLI, who, being duly sworn, testified:

I am connected with the house of Auffmordt & Company; am familiar with the actual market value and price of silk and cotton satins in the principal markets of Switzerland in 1886. The goods under consideration, marked H. Z., cases 172, 173, and 174, came from Switzerland. I know where they are made.

Q. Will you please state the true and actual market value and wholesale price of goods identical with these at the time of exportation in the principal markets of the country whence the same were imported into the United States?

Objected to by the defendant's counsel as immaterial, irrelevant, and incompetent. The court sustained the objection. Plaintiffs' counsel duly excepted.

Being cross-examined, he said:

I am not the exporter of these goods. I have charge of a department relating to umbrella silks.

Being redirectly examined by plaintiffs' counsel, he said:

147 I have seen these goods—these three cases; know their value and whence they came. I know their value in the markets whence they came.

Q. Will you please state the true and actual market value and wholesale price of these goods in the principal markets of Switzerland at the time of exportation, namely, March, 1886?

Objected to by the defendant's counsel as immaterial, incompetent, and irrelevant. The court sustained the objection, and plaintiffs' counsel duly excepted.

It was conceded that the excess recoverable, if any, by reason of duty paid on additions to value was the principal sum of $42; interest, $1.00.

Plaintiffs having rested their case, defendant's counsel moved the court to direct a verdict for the defendant on the ground that plaintiffs have not shown facts sufficient to entitle them to a verdict, except as to the merchant appraiser's fee of ten dollars, of which defendant's counsel states there is $8.75 on deposit at the custom-house subject to the call of plaintiffs.

After argument the court said:

As to this constitutional question, of course it is new to me. I never thought of it before nor have I had time to consider it while the argument has been going on. It seems to me, however, that you cannot say that it properly arises in this case in the view I take of it for this reason: I understand that Congress is under no obligation to grant reappraisal at all unless they choose to. They
148 could make the appraisal of the appraiser final and the importer would have no redress. They do give the importer the privilege of an appeal if he wants it.

The collector cannot take that appeal. There is nothing the col-

lector could do. That is not the question here. The collector has not taken an appeal which is involved here. It is the importer's appeal, and when the importer took the appeal he knew what it was. He knew that if he took the appeal he would have the merchant appraiser and the general appraiser. There is no question about the general appraiser; it is about the merchant appraiser. The importer has a right to ask that reappraisal of his own motion for the purpose of reducing the appraisal on his goods. He did ask it, and if he had the appraisal he had just what he asked for—what he expected—that is, a reappraisal by a merchant appraiser and general appraiser, the merchant appraiser appointed by the collector or by the deputy collector. That being the case, I hardly think, on my present notion, that he could be heard to say that the very thing he asked for and expected was conferred by an unconstitutional law. I am not very clear about that, but it hardly seems to me that that question could arise—that he would be entitled to raise that question in that way.

I think one thing further: "Officer," as it occurs to me now, means one with a public duty somewhat continuous in its nature.
149 These merchant appraisers, if I construe rightly the law, are each appointed for each case; that the theory of the law is that the collector or the deputy collector appoints a merchant appraiser on each occasion, and that if two or three are acted upon at the same time it is not because he holds the office of merchant appraiser for a day or an hour or a quarter of an hour or for a month, but it is because the same man is appointed in two or three instances to act on more than one, and he acts on several at the same time. I do not think an appointment of a merchant appraiser for a day to hear any cases that come before him would be good. I don't think his oath to apply for a day or a week would be good. I think he should be sworn in every case.

Mr. TREMAIN: It was not in this case. The merchant appraiser was sworn in several.

Mr. WALKER: But he took separate jurats.

The COURT: Therefore I think they are a sort of statutory reviewers for each case that has been brought—for each importation. They do not hold an office, but just merely hold the designation for that one thing. That is my present impression. I do not speak of it with any great deal of confidence, but we must decide about it now, because we must have a verdict. Of course, on revision, the higher court may find all this to be very different.
150 This is my idea. The merchant appraiser is called in, designated by the collector to act on each particular case—to appraise on view. Their importance has not been overestimated by the counsel, because there is no appeal from their determination, so that what they do is final, when they do it regularly.

Therefore I think I am not called upon now to say any more about the constitutionality of this law. It has stood so long unchallenged that I would not, without looking it over a great deal, feel warranted to say, sitting in this circuit court, that a law was un-

constitutional which had stood so long and been challenged in so many ways, but which never was challenged in this way. To do so would create a great disturbance; for a court to say that it was unconstitutional would create a great disturbance, and I am not prepared to do it now.

Then as to the other questions raised by the evidence I entertain the same view that I did when the other case was tried on this subject as to everything that was involved in that case—that is, the right of the importer to be present by himself or agent—although the difference between that case and this in that respect is that I do not gather from the testimony of Mr. Robinson, as given here, that he understood that he was in any way excluded from his goods, which were in the adjoining room. I understand him to say that he understands now and understood then in substance that when his appraisal was going on he was at perfect liberty to be in the
151 room where the goods were and point them out to the appraisers, but not to the witnesses. I understood him that there was a notice on the door that led into that room that nobody would be allowed in there when the witnesses were examining. I understood him to say that he didn't understand but what, when this case was up and the merchant appraiser and the general appraiser were there, if he had wanted to, he could have gone right into the room and pointed out any of the goods he had a mind to. If he testified differently from that I didn't catch the force of it. He was asked to make his statement and understood that he has the right. He didn't question but that the samples they had were the ones, and was told when he got through to go, that the time was out. He stayed there as long as he wanted to, to do anything he wanted about pointing out his goods. Now I think the importer was entitled to that—to have him be there when their appraisal was made, to have him point out his goods to know they were his goods, to illustrate them and exhibit them in any manner he saw fit, and present to the appraisers any views he had. I think he had that right, but I am not able to say from this evidence that there is anything tending to show that he was denied that right.

There is one other point upon which, as I said, I am not clear; but I rule as before; my mind preponderates that way, and that is that when this board takes testimony (and, whether they
152 will take it at all or not, they are to decide themselves), whether they are bound to let the importer know that they are taking it, or, if they do let the importer know they have taken it, whether they are bound to let him know what it is, so — to answer it, I do not feel clear. I had a doubt before, I have a doubt now whether the importer hasn't a right to know if they take testimony, and to know what it is. But my impression is just as it was then, that it is discretionary with the board; that they may make inquiry by what they deem to be proper ways and means, and that the importer must rely on their fairness and judgment as to what they do take and the weight they give it, and therefore I rule on this question now as I did then: That the fact that they were not informed who the witnesses were and what they testified to and given an op-

portunity to cross-examine and an opportunity to meet it doesn't constitute an objection against the reappraisement. That would dispose of all the objections here except as to the question of control.

Now, in the other case the testimony was a little different from what it is here as to that. I don't think we have got competent proof here to be submitted to the jury tending to show that the general appraiser and merchant appraiser were so hampered by instructions as to what they were to consider, and the weight they were to give the evidence, and the evidence they should take, as that
153 they didn't do what they saw fit about it. Now, I think that board, when constituted by Mr. Brower and Mr. McCreery (when Mr. McCreery was selected), had a perfect right to do what they thought was fit, and that nobody had a right to control them in any way. If there was evidence to show that they were hampered by instructions in any way, and did not freely exercise their own judgment, I should think the importer didn't have a good reappraisement; but every such thing is denied. Mr. Brower has said that nothing was done as to him except what he has shown. Mr. McCreery had no papers or instructions or anything. They were sworn, and they met and acted just as they saw fit, so far as I think this evidence shows.

Therefore as to this, in this case, standing on its testimony as presented here, I shall direct a verdict for the defendant.

As to the ten dollars, unless the defendant has got some way to get around that, I think the plaintiffs should have a verdict as to that. If the defendant has any proof as to the ten dollars we will receive it.

Mr. WALKER: We have no proof.

Plaintiffs' counsel requested the court to submit to the jury for their finding the question whether or no there was any lawful appraisement or reappraisement in this case. The court refused to submit the evidence to the jury as requested by plaintiffs' counsel, and directed a verdict for the defendant, as requested by de-
154 fendant's counsel, except in the matter of the merchant appraiser's fee of $10, in respect to which the court directed the jury that the plaintiffs were entitled to recover $10; to which ruling directing a verdict for defendant upon the evidence, so far as the main questions at issue were concerned, and declining to submit the evidence to the jury as requested by the plaintiffs, plaintiffs' counsel duly excepted.

Plaintiffs' counsel then moved the court to direct a verdict for the plaintiffs for the further sum claimed (above the $10), on the ground that the statute under which the merchant appraiser was appointed in this case was unconstitutional and void, under article 2, sec. 2, Constitution of the United States, which reads as follows: "The Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments," claiming that the merchant appraiser is an inferior officer within the meaning of this section of the Constitution, and was not appointed in accordance therewith.

This motion was denied, and plaintiffs' counsel duly excepted.

Plaintiffs' counsel then requested the court to submit all of the testimony to the jury with proper instructions as to what constitutes an appraisement or reappraisement; which being re-
155 fused, plaintiffs' counsel duly excepted.

Plaintiffs' counsel also requested the court to submit all of the evidence to the jury touching the value upon which the duty was assessed and the value declared on entry, upon the ground that section 2930 of the Revised Statutes was unconstitutional, and therefore the plaintiffs are not bound by anything done under that section, and that the statutes giving us our common law action—being such an action as was maintainable prior to and guaranteed by the adoption of the Constitution of the United States, article VII of amendments, giving the right of trial by jury in all cases where by the common law that right then obtained—gives us the right in this case to submit any and every question touching the imposition of duty to the jury under proper instructions of the court on the evidence in the case; and we claim, further, that by withholding the evidence in this case from the jury by virtue of an unconstitutional statute which declares the reappraisers' conclusions final, plaintiffs are deprived of their constitutional right of trial by jury in cases where by the common law it obtains; which request being overruled, plaintiffs' counsel duly excepted.

The jury, then, pursuing said direction, rendered a verdict for the plaintiffs for $10 only.

156 And inasmuch as the foregoing matters of fact and law and the said several exceptions do not appear by the judgment record in this case, therefore on the prayer of the plaintiffs' counsel the foregoing has been settled and signed by the judge who tried the same as and for the bill of exceptions in this cause at the aforesaid term of said court, and directed the same to be filed as of the 11th day of December, 1886, the day of the verdict aforesaid.

Witness my hand.

(Signed) HOYT H. WHEELER.

157 [Endorsed:] U. S. circuit court. Clement A. Auffmordt *et al.* against Edward L. Hedden. Bill of plaintiffs' exceptions. Tremain & Tyler, att'ys for plaintiffs, 167 B'way, N. Y.

158 *Assignment of Error.*

Supreme Court of the United States.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, & ADOLPH WILLIAM VON KESSLER, Plaintiffs in Error,

ag't

EDWARD L. HEDDEN, Collector of the Port of New York, Defendant in Error.

Afterwards, to wit, on the second Monday of October term, 1887, before the justices of the said Court at the Capitol at Washington, came the said plaintiffs in error, by Tremain & Tyler, their attor-

neys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

In each and every of the several rulings of the court to which exceptions were taken, and in the refusals of the court to admit
159 testimony and to exclude testimony, to which refusal to admit and refusal to exclude due objections were made and exceptions severally taken, and in the refusal of the court to submit all of the testimony to the jury and to direct the jury to find a verdict for the plaintiffs in error for the full amount claimed or to instruct the jury as prayed for, all of which was duly severally excepted to, and in other respects where exceptions were taken and allowed, there was manifest error, as more fully and at large appears by the bill of said exceptions as the same appears of record; and that by the record aforesaid it appears that judgment aforesaid in form aforesaid given was given for a part of the claim of the said plaintiffs in error, whereas by the law of the land the said
160 judgment ought to have been given for the said plaintiffs in error against the said defendant in error for an amount larger than that given.

And the said plaintiffs in error pray that the judgement aforesaid for the error aforesaid and other errors in the records and proceedings, as the same appear more fully therein, may be corrected, and that done what of right and according to law should be done, and that they, the plaintiffs in error, may be restored to these things which they have lost by occasion of said judgment, etc.

TREMAIN & TYLER,
Att'ys for Pl'ffs in Error.

Endorsed: Supreme Court of the United States. Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, plaintiffs in error, ag't Edward L. Hedden, collector of the port of New York, defendant in error. Assignment
161 of error. Tremain & Tyler, att'ys for pl'ffs in error, 167 Broadway, New York city. Due service of a copy of the assignment of error, of which the within is a copy, is hereby admitted. Dated New York city, August 6, 1887. Stephen A. Walker, U. S. att'y.

Endorsed: U. S. circuit court. Filed Aug. 8, 1887. Timothy Griffith, clerk.

162 *Joinder in Error.*

Supreme Court of the United States.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, and ADOLPH WILLIAM VON KESSLER, Plaintiffs in Error,

vs.

EDWARD L. HEDDEN, Collector of the Port of New York, Defendant in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Stephen A. Walker, his attor-

ney, comes here into Court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in the form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
U. S. Attorney and Attorney for Defendant in Error.

163 [Endorsed:] 11132. United States Supreme Court. Clement A. Auffmordt *et al.*, pl'ffs in error, *v.* Edward L. Hedden, def't in error. Joinder in error. Stephen A. Walker, U. S. att'y & att'y for def't in error. Service of the within joinder in error is hereby admitted. Aug. 11, 1887. Tremain & Tyler, att'ys for pl'ffs in error. To Tremain & Tyler, Esq's, att'ys for pl'ffs in error. U. S. circuit court. Filed Aug. 11, 1887. Timothy Griffith, cl'k.

164 Circuit Court of the United States for the Southern District of New York.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, and ADOLPH WILLIAM VON KESSLER *ag'st* EDWARD L. HEDDEN, Collector of the Port of New York. } No. 11132.

I hereby consent that the plaintiffs in the above-entitled action may deposit in the registry of this court the sum of one hundred dollars ($100.00) in lieu of a bond on prosecuting a writ of error from the Supreme Court of the United States.

STEPHEN A. WALKER,
U. S. Att'y, Att'y for Def't.

Ordered accordingly.
Dated August 5th, 1887.

E. HENRY LACOMBE.

165 Endorsed: U. S. circuit court, southern district of New York. Clement A. Auffmordt, John F. Degner, William Degner, and Adolph William Von Kessler *vs.* Edward L. Hedden, collector of the port of New York. Consent and order for deposit in lieu of bond on prosecuting writ of error. Tremain & Tyler, att'ys for plaintiffs, 167 Broadway, New York city. U. S. circuit court. Filed Aug. 5, 1887. Timothy Griffith, clerk.

166 UNITED STATES OF AMERICA, *ss:*

To Edward L. Hedden, collector of the port of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-seven,

pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Clement A. Auffmordt, John F Degener, William Degener, and Adolph William Von Kessler are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York city, August 5th, 1887.

E. HENRY LACOMBE.

167 [Endorsed:] U. S. Supreme Court. Clement A. Auffmordt *et al.*, plaintiffs in error, against Edward L. Hedden, collector of the port of New York, defendant in error. Citation. Tremain & Tyler, 167 Broadway, New York city, att'ys for pl'ffs in error. 25 ch. A copy of the within paper has been this day received at this office. Aug. 8, 1887. Stephen A. Walker, U. S. attorney. U. S. circuit court. Filed Aug. 8, 1887. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 662. Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, plaintiffs in error, *vs.* Edward L. Hedden, collector of the port of New York. Filed August 15th, 1887.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 662.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, AND ADOLPH WILLIAM VON KESSLER, PLAINTIFFS IN ERROR,

vs.

EDWARD L. HEDDEN, COLLECTOR OF THE PORT OF NEW YORK.

Motion to Hear Cause With No. 179 *of October Term*, 1888 (*Badger, Collector, Plaintiff in Error*, vs. *Cusimano*).

And now come plaintiffs in error in the above-entitled cause, numbered 662, and respectfully move this Court that said cause be heard and determined concurrently with the cause entitled Algernon S. Badger, collector, plaintiff in error, *vs.* A. Cusimano *et al.*, docket number 179, October term, 1888, and for the following reasons cognizable from the records of said causes, namely:

I.

1. Both of said causes involve the right to recover in an action against the collector of customs alleged excessive duties exacted upon the plaintiffs' respective importations, which exactions were paid under protest and appeal.

sel for the importers in No. 179, except in so far as said time may not be desired or occupied by said counsel in case No. 179. Should it transpire for any reason that No. 662 should not be argued with No. 179 said plaintiffs in error move this Court for permission to argue this cause, No. 662, prior to the determination and decision of No. 179. The record in number 662 is printed.

Wherefore above-named plaintiffs in error, as well for the foregoing as for other reasons apparent on examination of the records in the said two causes, respectfully pray that said motion be granted.

Dated January 21, 1889.

H. E. TREMAIN,
MASON W. TYLER,
Counsel for Clement A. Auffmordt et al.,
Plaintiffs in Error.

Supreme Court of the United [illegible]

October Term, 1890.

No. [illegible].

CLEMENT A. AUFFMORDT, JOHN P. DEGENER, WILLIAM [illegible] NER and ADOLPH WILLIAM VON KESSLER,

Plaintiffs in Error,

against

EDWARD L. HEUDEN, Collector,

Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN [illegible]

TREMAIN & TYLER,
[illegible] Broadway, New York.

ALEXANDER P. [illegible],
4 William Street, New York,
Counsel for Plaintiffs in Error.

Evening Post Job Print, New York.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 78.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, AND ADOLPH WILLIAM VON KESSLER, PLAINTIFFS IN ERROR,

against

EDWARD L. HEDDEN, COLLECTOR, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

This action was brought by importers against the collector of the port of New York for alleged unlawful exactions paid under protest concerning certain importations of dutiable merchandise. After issue joined an order of severance was made (Record, fol. 20) for trial convenience, so that the questions tried below were the legality of an exaction of ten dollars paid by plaintiffs as and for the merchant appraiser's compensation (fols. 71, 154), and the further exaction of forty-two dollars (Record, fol. 147), the sum concededly recoverable, if any recovery could be had, by reason of duty paid on the excess assessed as foreign market values beyond the actual values as claimed and entered by the importer—that is to say, as representing the duty paid upon the alleged illegal additions to the entered values resulting from the alleged unlawful appraisement proceedings.

These small amounts and the severance of the action indicate the representative character of the issues.

The court below held the ten dollars' exaction to be without justification (fols. 153, 154), and the Government has acquiesced by the abrogation of this charge on the merchants and by paying the appraising officers from the Treasury; but the importers

bring this writ of error,—claiming errors impairing their rights to recover as to the duty paid on the *appraisers' additions to value.*

The merchandise in question, imported from Horgen, Switzerland, was subject to an ad valorem duty, and on original entry was valued by the importers 1,092.80 francs in excess of the original invoice (which was 6,249.50 francs less 272.30 francs of charges, netting 5,977.20 francs). Afterwards the appraisers made a further assessment or addition of net 440.10 francs (Record, fol. 75), which addition is the subject of this writ of error. In making this addition the appraisers claim to have allowed for the charges. On the other hand, if the importers' claim be correct, they have really paid duty on the charges and on 167.80 francs more. Notification of this addition (fol. 75) on April 20, 1886, was followed by seasonable protests and appeals, April 27 (Record, page 38) and April 29 (Record, page 42), lodged by the importer in accordance with the Treasury regulations then applicable. Thereafter, ninety days having elapsed without any decision (fol. 78) by the Secretary on the appeals, this suit was instituted. The addition was written upon the invoice in the first instance by the appraiser; and on its becoming known to the importers an appeal for a reappraisement was filed according to the regulation form (Record, fols. 76, 35–38). The reappraisers confirmed the previous appraisement.

The methods of procedure of this reappraising board, the issue as to whether, as required by statute, they proceeded by "reasonable ways and means" or were permitted in obedience to the existing orders of the Secretary of the Treasury to exercise "reasonable ways and means," and the composition and constitution of this board and the validity of its certifications as a defense to this action, are the leading issues presented by this record.

The Treasury regulations and the Secretary's special orders applicable to these appraisement proceedings are set out at length in the Record from pages 11 to 33 and are hereinafter further mentioned.

The merchant appraiser was appointed to act either by the collector (fol. 136) or deputy collector (fols. 91–95) having the usual notice from the custom-house (see Record, fol. 38, for form of notice of appointment), by virtue of which he assumed the office and took oath before the witness, Deputy Collector Jones (Record, fol. 136). The oath referred to several importations to be accordingly acted upon by this merchant appraiser (fols. 98, 99), who in fact acted upon several other importers' reappraisements on the same day he acted upon plaintiffs' (Record, fol. 100); but as to how many such cases the record is vague—at least four are shown (Record, pages 51, 52)—and more precise proof upon this point was rejected (Record, fol. 92). At all events, by virtue of *one* appointment the merchant appraiser exercised office over several importations.

Effort was also unsuccessfully made to get before the court and jury the fact that all appraising officers, or persons acting as such, were under stress to regard the values assigned by Government agents reporting from abroad schedules made up by themselves, presumably in fulfillment of their mission, and to disregard depositions, which were in the case at bar disregarded, although in form received, of competent witnesses engaged in foreign trading (Record, pages 44, 29, 31, 57, 58, 59, 60).

In the case at bar the depositions of trade witnesses called before the appraising board corresponded with the values as originally entered by the importers at the custom-house (Record, fol. 146). The arbitrary method of prcedure necessitated by compliance (Record, pages 30, 31) with the Secretary's orders and official wishes that consigned goods be appraised according to his agents' schedules (page 31); the exclusion of the parties from the examination of the witnesses and officers called to testify, as well as from the actual examination of the goods by either (if, in fact, *any* true examination of the packages *was* actually made, which is denied); the refusal to permit counsel to appear (see order, Record, fol. 68); and the necessary harshness implied by such rigorous practices as ordered and, in truth, observed, it is insisted *denude* the *procedure of the reappraising board of any fair claim to* "REASONABLE WAYS AND MEANS" *of procedure*, while the rejection by the court below of offers to establish these hardships and their habitual application by direction of the Treasury Department (Record, page 44), is a further ground for error, as hereinafter assigned.

The leading questions presented by this record are, therefore, whether in an action for the recovery of alleged excessive duties exacted the plaintiffs may show—

(1.) That in the appraisement on which the exaction depends the appraisers did *not* proceed according to "*reasonable ways and means*," as ordained by the language of the statute (U. S. R. S., secs. 2902, 2952).

(2.) What constitutes a fulfillment of the statute directing appraisers to proceed by "*all reasonable ways and means*" to ascertain the value in the principal markets of the country of exportation; and herein (*a*) may not the proceedings that occurred be laid bare in the proofs; and (*b*) is it not a question of *fact* (with instructions appropriate to each case) how far the proved proceedings are *not* "reasonable ways and means?"

(3.) Whether the current practice of the Government may not be detailed in proof in aid of such investigations.

(4.) Whether the appraisers' certified results are, and, if so, to what extent are they, "final and conclusive," no matter how unreasonable may have been their methods or results; or, may the importer, after an *unreasonable* appraisement procedure, sustain before the jury his oath on entry, in declaration of the *true* dutiable value.

(5.) May not the importer be present with counsel when mer-

chandise is inspected by or witnesses depose before, the appraising board?

(6.) Is not the merchant appraiser an OFFICER OF THE UNITED STATES, whose appointment by a collector—or it may be his deputy (Record, pages 98, 99)—is unconstitutional, and is not the section of the statute (U. S. R. S., sec. 2930) that is dependent upon such appointment consequently void? As against the plaintiffs is not the merchant appraiser an officer, as well by statute as under the Treasury regulations?

(7.) May not the importer show to the jury that he really paid duty upon charges which were not dutiable; and that they were added under the guise of value? May he not show how much of the amount on which he paid duty was made up of undutiable charges, and how much of dutiable value proper? Is he compelled on this point to accept the appraisers' certifications, if in fact the market value, when charges are excluded, is less than the assessed value?

The particular topics arising out of the foregoing questions and the claims as made by plaintiffs upon the trial below are discussed in the following points, based on the exceptions specified in the following

ASSIGNMENTS OF ERROR.

1. The court erred in excluding the question asked by the plaintiffs of Appraiser Brower:

Q. Did you proceed on that appra'sement in accordance with instructions of the Secretary of the Treasury, dated June 9th, 1885, and prior thereto, in respect to the method of procedure?

(These instructions are found at Record page 31 and the Treasury regulations printed on pages 11 to 30.)

To which question defendant's counsel objected that it was incompetent, irrelevant, and immaterial, and the court sustained the said objection, and plaintiffs' counsel duly excepted. (Record, page 44.)

2. The court erred, when Appraiser McCreery was upon the stand, in excluding the questions asked by plaintiffs' counsel:

Q. Did you at that time and on that occasion (referring to the occasion of the appraisement in controversy) act in any other cases?

Objected to by defendant's counsel as immaterial and irrelevant.

PLAINTIFFS' COUNSEL: We propose to show that when this gentleman was appointed, if he ever was appointed, he was appointed to act at this time upon a great many cases, and that the same authority he had for this case he had for the others, and the same authority he had for the others was his authority in this. * * *

Q. Do you remember acting at the same moment that you acted on this case on any other cases?

Objected to by defendant's counsel as irrelevant.

The COURT: That is excluded.

Plaintiffs' counsel duly excepted. (Record, page 45.)

3. The court erred in further excluding plaintiffs' offers of testimony, as follows:

Q. Did you, pursuant to that paper, whatever it was (being the notice of his appointment of merchant appraiser), and this oath, and at the time you acted

upon this particular importation, April 8, 1886, act upon several other importations? (Objected to.) A. I think I did.

Q. How many? * * *

Objected to as immaterial and irrelevant. * * *

The COURT: I think if you had an appraisement, that would be sufficient, although somebody else had one.

Plaintiffs' counsel excepted.

Q. And about how many?

The COURT: The number of them we don't care anything about, nor whose they were.

Plaintiffs' counsel excepted. (Record, pages 46, 47.)

4. The court erred in permitting plaintiffs' witness, Deputy Collector Jones, who was called only to identify, as he did, the the oath attached to the appraisement papers (Record, page 48), to answer upon cross-examination the following questions propounded by defendant's counsel:

Q. You are well acquainted with the ways of business respecting the appointment of merchant appraisers?

Plaintiffs' counsel objected that this is not a proper cross-examination upon anything brought out by us, * * * and that what the special deputy does about the appointments themselves is incompetent on this cross-examination and immaterial and irrelevant.

The COURT: We will take it.

Plaintiffs' counsel duly excepted.

A. I will answer this way, that the notice is signed by the collector or one of his deputies.

Q. In the absence of the collector, who, in the ordinary course of business, signs?

Plaintiffs' counsel objected as immaterial, irrelevant, and incompetent.

The COURT: That is admitted.

Plaintiffs' counsel duly excepted.

The testimony thus elicited by defendant's counsel was favorable to plaintiffs' contention that there existed an unconstitutional office; but the introduction of the evidence in the middle of plaintiffs' case and through plaintiffs' witness called to make a formal proof, was very objectionable and prejudicial to a fair and orderly trial.

5. The court likewise similarly erred in permitting the same witness to answer defendant's cross-examination, as follows (fol. 96):

Does the collector usually designate a special deputy to act in his absence? * * *

The COURT: He may answer.

Plaintiffs' counsel duly excepted.

The COURT: You may ask him if he knows about that.

By DEFENDANT'S COUNSEL:

Q. Do you know the usage in that respect?

Plaintiffs' counsel objected as immaterial, irrelevant, and incompetent, and as involving a conclusion of law.

The COURT: He may answer.

Plaintiffs' counsel duly excepted.

The COURT: The point is whether you know and are familiar with the custom about it.

A. I know that the collector usually has a special deputy * * *

Q. I now repeat my question whether the collector does not usually designate a special deputy to act in his absence?

PLAINTIFFS' COUNSEL: We take the same objection to that, and, it being over-

ruled, plaintiffs' counsel duly excepted. (See Record, page 50, for testimony thus admitted.)

6. The court erred in excluding the plaintiffs' offer in evidence of the classification of the employés in the classified customs service, as certified to by the Secretary of the Treasury under Revised Statutes, section 882, being the classification provided for by section 6, act of Congress, approved January 16, 1883. (Record, page 52.)

Defendant's counsel objected to the same as incompetent, immaterial, and irrelevant, and the court sustained the objection, and plaintiffs' counsel duly excepted.

The following is so much of said classification as is needful to be here recited. No objection was made to the authentication of the certificate.

CLASSIFICATION OF EMPLOYÉS AT THE CIVIL-SERVICE CUSTOMS PORTS.

Class A. All persons not employed merely as laborers or workmen receiving a compensation amounting to nine hundred dollars or more, but less than twelve hundred dollars per annum.

Class 1. All persons receiving a compensation amounting to twelve hundred dollars or more, but less than fourteen hundred dollars per annum.

Class 2. All persons receiving a compensation amounting to fourteen hundred dollars or more, but less than sixteen hundred dollars per annum.

Class 3. All persons receiving a compensation amounting to sixteen hundred dollars or more, but less than eighteen hundred dollars per annum.

Class 4. All persons receiving a compensation amounting to eighteen hundred dollars or more, but not including any officers confirmed by the Senate.

And the court further erred in excluding plaintiffs' offer to show that this merchant appraiser (McCreery) was not appointed under the civil-service rules under the act of 1883.

The court excluded the evidence and plaintiffs' counsel duly excepted.

7. The court erred in allowing as material evidence answers of plaintiffs' witness and agent, Robinson, on cross-examination, to questions of defendant's counsel:

Q. Did you make any objection at the time that your goods were not being examined?

Objected to by plaintiffs' counsel as immaterial; objection overruled; plaintiffs' counsel duly excepted. (Record, fol. 105.) * * * And likewise to the question:

Q. Did you make any objection of any kind at the time of the reappraisal, to the merchant appraiser?

Plaintiffs' counsel objected to this as immaterial, irrelevant, and incompetent; which objection being overruled, plaintiffs' counsel duly excepted. (Record, fol. 107.) * * *

8. The court erred in excluding (Record, fol. 114) the testimony, proffered by plaintiffs, of Assistant Appraiser Kent in response to the following questions:

Q. Will you please state what purpose in the usual course of business relating to appraisements these papers such as you produce here (being certain reports from Government agents located near the foreign consulate at the place of exportation, see Record, pages 57, 58, and 60, 61, being Exhibit No. 14), either under the instructions of the Secretary of the Treasury or otherwise—what do they fulfill so far as your action is concerned? Will you please state

what purpose, so far as your official action is concerned or the official action of your subordinates—what purpose is fulfilled by these expert or so-called expert documents similar to that which you now produce and which you say you received? (Record, page 58.)

Objected to by defendant's counsel as irrelevant, immaterial, and incompetent. * * * (Record, fol. 114.)

The COURT: * * * Leave it out.

Plaintiffs' counsel duly excepted.

9. The court erred in excluding testimony proffered by the same witness in response to the following question:

Q. When the examiners are called before the reappraisement board to make their statement what is the usual course of practice, so far as you know, in respect to taking with them these expert statements?

Objected to by defendant's counsel as immaterial and irrelevant. The court excluded the evidence, and plaintiffs' counsel duly excepted. (Record, fol. 114.)

10. The court likewise erred in excluding as follows:

Plaintiffs' Exhibit No. 14, above mentioned, being shown to the witness, he was asked (Record, fols. 115–117):

Q. This paper which you produce has special reference in it to this particular importation, has it not? Ans. This is an invoice which is called for in that paper.

Plaintiffs' counsel then offered in evidence the paper which has just been identified by the witness, being the paper just marked Exhibit No. 14.

Defendant's counsel objected, and the court sustained the objection and excluded the said paper from evidence; whereupon plaintiffs' counsel duly excepted.

This excluded paper, marked Exhibit No. 14, is as follows: United States consulate, Horgen, 25 February, 1886. To the collector of customs, New York. Sir: Permit me to call your attention to the following memoranda of Mr. John Schmid, a government silk expert for this district, concerning certain undervaluations of merchandise described in invoice No. 213 of this consulate. Samples of the goods, as well as a calculation showing the basis of the expert's conclusions, are enclosed. I am, sir, your obedient servant, William T. Rice, U. S. consul.

HORGEN, SWITZERLAND, 25 *February*, 1886.

To the United States consul at Horgen. Sir: Following please find calculations showing an undervaluation in the value of merchandise covered by invoice No. 213, shipped by mechanical silk-weaving establishment, Ruti, to C. A. Auffmordt & Co., New York. According to my calculations the goods described in this invoice could not be made in this district for the prices at which they are invoiced. I leave out of the calculation entirely all costs for packing, freight, insurance, and commissions, as well as allowances for profits, my aim being to report only the absolute cost of producing such goods here in the factory. Yours respectfully, John Schmid, silk expert.

Then follows the calculation as recited in the record (page 60). (The eighth specification of error should be re-read here.)

11. The court erred in excluding from evidence, as offered by plaintiffs, the depositions of witnesses who deposed as to values before the board of appraisers. (Record, pages 73 to 76.)

The COURT: They object to the contents and the contents are excluded. The fact that they had the deposition is already in.

"Plaintiffs' counsel duly excepted." (The said depositions are all similar in form, giving the valuations of the deposing witness against each item of the invoice. Said valuations substantially agreed in result with the plaintiffs' valuations as declared on entry.)

"Plaintiffs' counsel caused a separate exception to be noted to the ruling of

the court excluding said depositions and each thereof from evidence, which exceptions were allowed accordingly." (Record, fol. 146.)

12. The court erred in excluding testimony offered by plaintiffs in response to the following question propounded to a qualified witness:

Q. Will you please state the true and actual market value and wholesale price of goods identical with these at the time of exportation in the principal markets of the country whence the same were imported into the United States?

Objected to by the defendant's counsel as immaterial, irrelevant, and incompetent. The court sustained the objection, and plaintiffs' counsel duly excepted. * * *

Q. Will you please state the true and actual market value and wholesale price of these goods in the principal markets of Switzerland at the time of exportation, namely, March, 1886?

Objected to as immaterial, incompetent, and irrelevant. The court sustained the objection, and plaintiffs' counsel duly excepted. (Record, fol. 147.)

13. The court erred in its refusal to submit the evidence to the jury upon "the question whether or no there was any lawful appraisement or reappraisement in this case," as requested by plaintiffs' counsel, and in directing a verdict for the defendant, as requested by the defendant's counsel, except in the matter of the merchant appraiser's fee of ten dollars, in respect to which the court directed the jury that the plaintiffs were entitled to recover ten dollars; "to which ruling, directing a verdict for defendant upon the evidence, so far as the main questions at issue were concerned, and declining to submit the evidence to the jury, as requested by the plaintiffs, plaintiffs' counsel duly excepted." (Record, fol. 154.)

14. The court erred in refusing the motion of plaintiffs at the close of all the testimony, as follows:

Plaintiffs' counsel then moved the court to direct a verdict for the plaintiffs for the further sum claimed (above the $10), on the ground that the statute under which the merchant appraiser was appointed in this case was unconstitutional and void under article 2, sec. 2, Constitution of the United States, which reads as follows: "The Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments," claiming that the *merchant appraiser is an inferior officer* within the meaning of this section of the Constitution, and was not appointed in accordance therewith. (Record, fol. 154.)

This motion was denied, and plaintiffs' counsel duly excepted.

15. The court erred in refusing "to submit all of the testimony to the jury, with proper instructions as to what constitutes an appraisement or reappraisement; which request being refused, plaintiffs' counsel duly excepted." (Record, fol. 155.)

16. The court erred in refusing the following request of plaintiffs' counsel:

"Plaintiffs' counsel also requested the court to submit all of the evidence to the jury touching the value upon which the duty was assessed and the value declared on entry upon the ground that section 2930 of the Revised Statutes

was unconstitutional and therefore the plaintiffs are not bound by anything done under that section, and that the statutes giving us our common-law action —being such an action as was maintainable prior to and guaranteed by the adoption of the Constitution of the United States, article VII. of amendments, giving the right of trial by jury in all cases where by the common law that right obtained—gives us the right in this case to submit any and every question touching the imposition of duty to the jury under proper instructions of the court on the evidence in the case; and we claim further that by withholding the evidence in this case from the jury by virtue of an unconstitutional statute, which declares the reappraiser's conclusions final, plaintiffs are deprived of their constitutional right of trial by jury in cases where by the common law it obtains; which request being overruled, plaintiffs' counsel duly excepted." (Record, page 80.)

The Statute

relied upon by the Government is as follows:

U. S. Rev. Stat., Sec. 2930: "If the importer, owner, agent or consignee, of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which *the collector shall select* one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, *to examine and appraise the same, agreeably to the foregoing provisions;* and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final, and be deemed to be the true value, and the duties shall be levied thereon accordingly."

No appraisement of imported merchandise is by any statute made conclusive, except by virtue of the foregoing provision. In the absence of Section 2930, appraisements, like all other proceedings of customs' officers, are subject to review after proper protest, in any action at law (Secs. 2930 and 3011).

All appraisements shall be by "*all reasonable ways and means.*" U. S. R. S., Secs. 2902 and 2952. (*For other statutes involved see Point V.*)

POINTS AND ARGUMENT.

PART FIRST.

I.

Did the Reappraising Board proceed by "all reasonable ways and means" in their power, in so far as what *was* done is exhibited by the proofs; and was the exclusion of further proofs as offered erroneous?

So far as appears from the testimony of plaintiffs' agent (Robinson, fols. 102–104), the orders of the Secretary of the Treasury were in force upon this reappraisement. The evidence of the general appraiser as to whether the method of procedure in this instance exactly coincided with those orders was excluded (Record, p. 44) under exception assigned here for error.

The Treasury orders are in proof, and are shown to have been applied. Moreover, the presumption would be that they were obeyed.

Those orders should, therefore, first be considered with reference to an importer's rights upon a reappraisement. For the purposes of this branch of the case we need not speculate as to whether the Board is by law independent of or subject to, the supervisory direction of the Secretary of the Treasury, or to what extent the latter may lawfully control its procedure. It is enough that such superintendence exists, was applied in this case, and as exhibited in the record has become a recognized and powerful department of the customs service.

What, then, is a reappraisement? It is a proceeding by a so-called "special tribunal" to determine an issue. That issue is the certification by the first appraiser and the importers' expressed "dissatisfaction" therewith.

The original appraisement is a comparison of the merchandise with the invoice, and a report upon the verity of the invoice and the valuation of its items (U. S. R. S., Secs. 2902, 2952). It occurs under the statute upon every invoice, and is the basis in the first instance, of the collector's subsequent liquidation of the entry. If values be advanced and dissent is expressed a new condition is presented, and *an issue* is to be tried or investigated.

The Board charged with this duty is of a composition in practice unknown to the dissentient importer until he appears in answer to its summons. They may proceed without his knowledge, or at his inconvenience, or in utter disregard of his rights. By Sec. 2930, R. S., these reappraisals are to proceed "agreeably to the foregoing provisions;" by which it is declared that the reappraisals shall proceed "by all reasonable ways and means in his or their power" (Secs. 2902–2952). As ordered by the Secretary they will "reappraise the merchandise in substantially the same manner as is pursued on original appraisements" (Rec., p. 30). In original appraisements they give no notice of procedure. Passing for the moment this questionable order, it is clear that *the Board is to determine a difference* between the importer and the original appraiser as to the dutiable value of imported merchandise. If not a "case," it is a "controversy." How shall it be *reasonably* heard and determined? We say that under the Secretary's orders, recited in the record and the proofs, it could not be *reasonably* heard at all. Because (1) the importer, or his agent, was practically excluded from the reappraisement; (2) was not afforded opportunity to support his entry oath, or within proper limits to confront the opposing witnesses by testimony in his own behalf; (3) or to sift and test

evidence secretly or openly heard in opposition to him; (4) or to have the aid of counsel, if he desired.

(1.) The first right of the importer is that of personal appearance before the Board. A denial of this right can only proceed on the theory that the Board may peremptorily assess, which at once establishes the OFFICE of the merchant appraiser and fixes the consequent unconstitutionality of his appointment. But assuming that *some* investigation is to be had by this Board to redress an alleged wrong, it is a "fundamental rule" that the parties must be given "an opportunity to be heard in relation thereto" (23 Wend., 632).

Conceding, for the sake of argument, the governmental necessity for proceedings of a more or less summary character in the assessment and collection of taxes, it must be "a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him; and it would seem to be a dictate of strict justice that the law should make reasonable provision to secure him as far as may be against partiality, malice or oppression" (Cooley Taxation, p. 265). In recognition of the guarantees given by our fundamental laws protecting such rights, the same authority expresses the opinion that "notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right." Referring to various State laws, he adds: "It is not customary to provide that the taxpayer shall be heard before the assessment is made, but a hearing is given afterwards, either before the assessors themselves or before some court or board of review." (Perhaps a review before a court after the tax had been paid under protest is all that Congress intended and the very thing they did intend.)

But with the importer's actual appearance—as in this case—at the reappraisement, arises the question, *What is he there for?* To wait in an ante-room guessing at the proceedings he is debarred from until called in and asked to make his "statement" (Rec., fol. 103), or to become then a mute and passive spectator of such proceedings as the appraisers may conduct in his presence? His right to *appear* is a matter not of form but of substance, and is to enable him within proper limits to secure submission to the appraisers, of all the relevant facts and considerations that may aid in the just and impartial decision upon the transaction at issue.

(2.) The right to appear, therefore, before a Board having power of summoning witnesses, fairly carries with it the right to support his own oath, or to confront opposing witnesses by testimony in his own behalf. The importer might as well have taken no appeal if not to be permitted to adduce evidence in corroboration of his statement; and unless he knows how and by whom his statement is disputed, why corroborate it? It is to supplement and to maintain his oath declared on entry, by any competent and attainable evidence to be addressed to any point of variance that his right of appeal is given. The familiarity of

the merchant appraiser "with the character and value of the goods in question" serves not as a substitute for the evidence to be taken, but as a qualification for him to comprehend the force and effect of the evidence contemplated by the statutes. The importer then should have the opportunity to bring witnesses, have them summoned if need be, and, through the personal presentation and examination of his witnesses, in the presence of the goods, and in the presence of the *exhibits used by other witnesses, and with knowledge what they have testified to*, refute falsehood or correct error or show official caprices. This right also is and was in this case denied (Rec., fol. 103, p. 30 and *ante*).

(3.) The right of the importer to sift and test the evidence of opposing witnesses who are summoned by the Board need not be claimed as a constitutional or strictly legal right, but it results from a sense of justice. Without this right, or privilege—if it be only a privilege—the judicial mind easily condemns the procedure as unjust and *un*reasonable in its "ways and means." What court or jury—treating it as a question of law, or of fact, or of both—in the presence of a statute directing this Board to proceed by "all reasonable ways and means" in their power, will declare it "reasonable" to exclude the importer from hearing such testimony and from subjecting it to reasonable tests and reasonable cross-questioning. This right also is and was in this case denied (Rec., fols. 102, 103, 104, 106). The Board is not viewing property to value it "on view," but is ascertaining a value in foreign countries, in foreign currency, by exceptional standards elaborately prescribed in many statutes.

(4.) The opportunity of the importer to appear before this board with counsel ceased absolutely in June, 1885. To go through with the form of demanding of the board in each case, these rights would have been an idle ceremony (U. S. *v.* Swift, 111 U. S., 343). The Treasury instructions governing the proceedings (Rec., pp. 29-31) were in force, and as the testimony shows (fols. 102 to 107) rigorously applied. "I have gone through with that process (formal appearance, but actual exclusion) many times," says the experienced witness who went through the form of appearing, and was then told to "go." The Secretary's orders were, "There is no office here for the lawyer or custom-house broker, and such persons * * * should be excluded" (Rec., fol. 68) The issue is not as to what counsel may or may not say or do but as to the absolute exclusion of counsel. This exclusion is consistent with the ordered denial of the foregoing three above-mentioned rights; for with the exclusion of the client from any practical participation in the proceedings affecting his property or his debt, the physical attendance of his lawyer would be useless and insincere.

For the importer to have wasted his time in useless objections and demands at the so-called proceedings on reappraisement, would have been not only in fact an idle ceremony, but of no fortification to his rights; first, because he did protest at the

time prescribed by statute for that purpose, and his protest covers every step in the assessments he paid upon; and second, because his rights in nowise depended on their assertion, but upon the fair procedure of the assessing officers or board. Besides, his acquiescence in an unfair procedure is not to be presumed or concluded, even though he was at all times present and silent. But in fact he was not present and did seasonably demur and protest. This Court has held that even receipts and settlements made with a revenue officer in the regular course of business "in pursuance of a demand and necessity" for the conduct of one's business under the existing methods of official procedure were not "voluntary in such sense as to preclude the appellant from subsequently insisting on his statutory rights" (Swift *v.* U. S., 111 U. S., p. 343). This was put upon the grounds that "the parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue business."

Being "in the power of the officers of the law," one can only "do as they required." Plaintiffs had no option, and knowing the Treasury orders in force, were not under any duty to call upon the Treasury subordinates to disregard these orders at every step in the assessment. It was sufficient to protest against the unwarrantable procedure of the Board, as to whose methods plaintiffs had no responsibility. Plaintiffs protested according to law; and the arbitrary methods described in this record, even to the objectionable orders, still prevail. The existing Boards, composed of officers with permanent tenures, are bound by those orders, even now in force, unless the latter shall receive the judicial criticism which, it is submitted, they justly deserve.

The reappraisement procedure was under regulations aptly described by this Court as having been "made known to those interested, and would not be changed on further application (see Appendix), and that consequently the business was transacted upon that footing, because it was well known that it could not be transacted upon any other. A rule of that character, deliberately adopted and made known and continuously acted upon, dispenses with the necesssity of proving in each instance of conformity that the compliance was coerced" (*Ib.*, 344). The officers of the law having established and acted upon a rule * * * that the public business would be transacted contrary to law, dispensed with the necessity of an offer to pay in some other way, *i. e.*, to do some other thing; and "the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary by law to secure his right" (*Ibid.*, 344.)

It requires no argument to establish the absence of "reasonable ways and means" of a tribunal which proceeds to examine any issuable matter under a rule excluding lawyers.

In Phillips Academy case, 12 Pick., 243, 354, it was argued: "Natural equity and justice require that a man should be heard in his own case, and it is only the reasonable extension of this

plain maxim that he should be heard by an advocate; and so we find that in all cases of a judicial nature under all systems of law advocates and proctors are allowed;" and this argument was accepted by the Court, which cited the five essentials to a trial, viz., a citation to appear, a charge to answer, a competent time for the proofs and answers, a liberty for counsel to defend, and a solemn sentence after hearing all proofs and answers; and added: "It is not to be insisted on that in exercising the powers vested in a new jurisdiction where no forms are prescribed any precise course as to form must be followed, but *these rules indicate the course which in substance must be pursued by every tribunal acting judicially upon the rights of others.*" This re-appraising board assumes to perform such a function.

"Reasonable ways and means" implied "opportunity to be heard," and that means by counsel. So held where the Mayor of New York assumed otherwise (Peo. *v.* Nichols, 79 N. Y., 582). "Defendant might also cross-examine witnesses produced to support these charges, call others in his defense, and in these and other respects be represented by counsel. *In no other way* could the person sought to be removed have a due hearing or an opportunity to be heard."

No reason for disregarding these wholesome fundamental principles can be suggested that does not emanate from the indisposition of officials to have their proceedings subjected to the keen scrutiny of expert investigators. But it IS ESSENTIAL TO THE STRUCTURE OF OUR GOVERNMENT THAT OFFICERS, STATE AND FEDERAL, SHOULD BE AMENABLE TO THE JUDICIARY, NOT ONLY FOR THEIR RECTITUDE, BUT FOR THEIR OBEDIENCE TO THE OBLIGATIONS OF THE COMMON LAW, AND TO THE SPECIFICATIONS OF THE STATUTES CONCERNING THEIR OFFICE.

But if the "reasonable ways and means," that should attach to the proceedings of these Boards shall escape judicial cognizance in an action such as the case at bar, then the procedure of this Board will be utterly exempt from judicial correction,—for no other case will reach that procedure.

Nor, under the continuance of the orders and practices shown in this record, will the proofs in any variety of cases substantially differ as to the procedures of the Board. They could not, in the nature of things, differ, unless the orders shall be disregarded. Besides the importers and officials know the orders, and necessarily adapt themselves accordingly. For the importer, orally or in writing, to object and protest, or to make a special claim of each and all of these denied rights or privileges, would not avail him in law, and would, in fact, injure his appraisement results. Besides, he need not do so. He is given the right to protest to the collector, and that he has done, specifying all these denials of opportunities. He proves the orders in force at the time, and the common usages then current. He presents a claim of a procedure in violation of the statute.

Plaintiff in error asked to go to the jury upon the *reason-*

ableness of the procedure, whether or no there was "any lawful appraisement;" and asks the Court to tell the jury what is a lawful appraisement, claiming there was none. (Rec., fols. 154–155, 143.)

The refusal is relied upon as error.

Under the regulations and Secretary's orders recited in the record, the foregoing four rights and privileges were denied.

The merchant appraiser is to reappraise "in substantially the same manner as is pursued on original appraisement" (Rec., p. 30). This must begin with a "thorough examination" of the the goods "in connection with the specifications" and values in the invoice (Rec., fol. 31). From this examination the plaintiffs were excluded. The Board is to limit the importers' "privilege" of appearance "to *one person* in each single case of reappraisement, to receive only statements of fact, to require all facts to be stated concisely and not argumentatively;" and "merchant appraisers appointed in cases of appeal from the decisions of the customs appraisers are also to be governed by this article" (Rec., fol. 62). "Unauthorized persons" are to be rigidly excluded from the rooms where the goods are "under examination," while subordinates are forbidden "to *hold communication* with *interested persons* concerning the goods under appraisement" (Rec., p. 28). "Appraisers are authorized to summon witnesses, but there is no authority for the *public examination* of such witnesses, or their cross-examination by importers or counsel employed by such importers" (Rec., fol. 67). There is no prohibition against such treatment of witnesses by the Government counsel, who are its skilled agents.

The regulations must not be "so construed that attorneys at law and custom-house brokers" may act as representatives of the importer on reappraisement. The Secretary assumes to select the importer's representative by directing that he is to be "his employé or salesman." * * * "There is no OFFICE here for the lawyer or custom-house broker, and such persons * * * should be excluded" (Rec., fol. 68). Nevertheless, it is under such conditions that testimony may be enforced (Rec., fols. 34, 44), and its *record formulated in secret;* for all "depositions taken" of persons called before these appraisers or papers produced "shall be filed in the collector's office and preserved for future use or reference, to be transmitted to the Secretary of the Treasury" (Rev. St., Sec. 2922, Rec., p. 20). The inquisitions of this Star Chamber remain in perpetuity. "Application for copies of proceedings on reappraisements" should be made to the general appraiser, who will exercise his discretion in regard to furnishing the same" (Rec., fol. 41.) "Merchants' appraisements *should not assume the nature of a judicial inquiry* (if not, then, of course, the executive OFFICE exists, and is unconstitutional) where judgment is rendered in accordance with the predominance of testimony on either side, but should be conducted as an investigation by experts to ascertain

whether the local appraiser has reported the true and proper market value of the merchandise in question" (Rec., fol. 41).

All of these orders were, in the case at bar, carefully observed, even to the form of according to the importer, the "privilege" of appearing.

The employé, being in waiting in an ante-room, was informed that he was "wanted." The "general appraiser rings the bell, and the chief clerk then goes in, and then comes out and says: 'Auffmordt's man is wanted'" (Rec., fol. 108). "The name of the merchant selected to assist in the reappraisement" is not divulged to the importer (fol., 37, 103). What proceedings, if any, had already occurred were unknown to the party interested. He was not allowed in the room where the goods were, did not see the witnesses examine the goods (fol. 109), was excluded from that (fol. 104); did not hear their depositions, or the statement of the examiner against whose original action the appeal was taken (fols. 103, 104). If the members of the Board ever did examine the goods themselves, as prescribed by law, the plaintiff was then excluded; and is consequently without means to prove the facts as to what examination was made except by the incontrovertible word of the members of the Board. In this case he has discovered that *some* witnesses deposed, and some statements were taken not under oath, how many of either are unknown,—as at such time plaintiff was excluded (fol. 106). He was called in for less than "five minutes" (fol. 108), and "asked to state" how much the goods "were worth" (fol. 105). He said he had entered them "at what we considered full market value," and "in accordance with the previous invoice from the same manufacturer at the same place" (fol. 106). The witness' "attention had been called on previous occasions to the exclusion of the importer from the reappraisement proceedings. I had noticed it by the circular letter of the Secretary of the Treasury and also by the action of other merchants and myself in cases where we had asked to be present and had been refused under that letter" (Rec., p. 53). Except to make a statement, he was "not present on the reappraisement." It is like asking the accused after a trial conducted in his absence, what he has to say why sentence should not be pronounced, and denominating that as a "privilege," an "opportunity to be heard" in defense of the accusation.

It is difficult to reconcile the functions of this Board as prescribed by the Treasury with the various obligations imposed by Congress. Speculation upon their *quasi*-judicial, administrative or ministerial characters is inconsequential. Definitions are of no assistance. Its members are directed by Congress, "by all reasonable ways and means in his or their power to ascertain, estimate and appraise the true and actual market value and wholesale price * * * of the merchandise at the time of exportation and in the principal markets of the country whence the same has been imported into the United States" (Rec., p. 43; R. S., 2902). And not to include charges in that value. And

this value is to be arrived at by considering specified items and rejecting others (Rec. pp. 19–26, Arts. 476, 477, 478, 486, 487, 488 to 506) as prescribed by successive statutes. Many of the phrases in these statutes have heretofore received judicial interpretation, but the phrase "all reasonable ways and means" has never been passed upon by this Court.

If the Board is to determine an *issuable* matter, then "reasonable ways and means" implies the exercise of their own judgment in accordance with the recognized principles of justice. These fundamental principles are shown to have been disregarded; and necessarily so under governmental direction.

The judiciary, therefore, as the ultimate tribunal to secure the execution of all laws, should scrutinize the method of procedure and determine as to compliance with the "reasonable ways and means" prescribed by statute. This is a duty, we submit, obligatory upon the judiciary department; and the right to perform this duty cannot lawfully be interfered with by Congress.

If the functions of the Board, however, are of that administrative or ministerial character irrevocably acceptable elsewhere because of the certificate of its official conclusions, then the organization of the Board does not proceed from constitutional sources; and its certificate is insufficient to support this judgment.

II.

If the conclusions of the Board are not to be regarded as the conclusions of *officers* of the United States, and therefore of an unconstitutional tribunal, then they must be deemed conclusions of some quasi-judicial tribunal, whose proceedings must conform to the fundamental principles of the common law, and of common justice, besides conforming to the requirements of the statutes. Having shown, in this case, to the contrary, it was competent to adduce proof on the merits of the issue covered by the importer's appeal. This proof was excluded below, and the twelfth assignment of error is submitted as well taken.

This case is distinguished from the case of Hilton *v.* Merritt, 110 U. S., in many important features. In that case the unconstitutionality of the merchant appraiser's office was not raised; nor the "reasonable ways and means" pursued by the Board. Besides, it was not the conclusions of the *Board* which were at issue. The merchant appraiser had sustained the importer, and hence there was *no* conclusion by the Board. There was a disagreement and a consequent *new* proceeding, by and before the collector, that was at issue. It was the collector's procedure, qualifications and certified conclusions of fact, and his only, that, in the Hilton case, were assailed at the trial. The Court said:

"The question presented by the exceptions of plaintiffs is whether the valuation of merchandise made by the customs officers *under the statutes* of the United States" is conclusive, &c. * * * "The solution of *this question* depends upon the provisions of the Act of Congress regulating the subject." The Court then holds that when the dutiable "value of the merchandise is ascertained by the officers appointed by law," their appraisement shall be final and the "duties shall be levied accordingly."

If any questions similar to those now at bar were considered by this Court in the Hilton case, there is no evidence of it in the opinion, or suggestion of them in the records or briefs in that case.

Moreover, non-compliance with law by the appraisers, or their own disqualification, have been expressly declared to invalidate the appraisers' conclusions; and judgments of two circuits have been reversed by this Court upon that principle in Oberteuffer *v.* Robertson, 116 U. S., 499; Oelbermann *v.* Merritt, and Mustin *v.* Cadwalader, 123 U. S., 363–9.

In *Robertson* vs. *Frank Bros. & Co.*, 132 *U. S.*, 17, this Court say, p. 24: " * * * if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable. This qualification applies to the acts of many other officials charged with duties of a similar character, such as assessors of the value of property for taxation, commissioners for appraising lands taken for improvements, or damages sustained by owners of land and the like." It was complained that plaintiffs were compelled to add for and to pay duties on undutiable charges. The appraiser had required and in consequence plaintiffs had paid duty upon an addition to the market value of the goods, which addition was in the form of a charge for "cost of transportation (*Ib.*, p. 26). The plaintiffs disputed this item. Evidence was gone into on the subject, and the matter was left fairly to the jury. The only question for us to determine is whether the matter was open to evidence and could lawfully be left to the consideration of the jury; or, whether the determination of the appraiser on this subject was conclusive." *Held*: This "was a question open for examination," citing Oberteuffer *v.* Robertson, 116 U. S., 499; Badger *v.* Cusimano, 130 U. S., 39, where an appraisement was made whereby undutiable charges were included in the appraised value, and it was decided "that such an appraisement is not lawful or conclusive."

It is therefore no longer an open question that a recovery may be had where the appraisers disregarded statutory rules; and so for any disregard of law.

Cases, therefore, exist where the appraisements being unlawful are *not* conclusive, and the case at bar belongs to that class.

If this were not so, any illegality or procedure beyond their powers by appraisers would conclude an importer as morally guilty of perjury in swearing to his value declared on entry.

For if the decision of the customs officers be conclusive and correct, no matter how arrived at, the merchant has undoubtedly sworn falsely.

A judicial conclusion so repugnant to justice will not be arrived at unless necessitated by the plain terms of an incontestable statute.

The evidence, therefore, of the witness *Wehrli* should have been received, and its exclusion was error (fol. 147).

III.

It is to be observed that the functions of the *reappraisers* are not those of ordinary assessors of damages or of the worth of property under view; but those of *judges of a remote fact in its nature dependent on evidence.*

They are to determine the value in designated foreign localities and at an antecedent period of time, of the particular article which has been exported. They must first ascertain what are the principal markets for that commodity *in that country*, if any there be; if there be no such markets, they are to find its cost of production in that foreign country (Sec. 9, Tariff Act of 1883). They are to arrive at such values at a specific date (of shipment) and express them in the currency of that foreign country, and in arriving at these results *they must omit certain items* dependent more or less on the usages of that foreign trade. All these facts, by their essence, depend not at all on intuition, or familiarity with any particular kind of merchandise, but on the intelligent *judgment of the tribunal authorized to acquire the necessary evidence to form a judgment.*

The judgment is not capable of being exerted upon anything else but upon evidence of *some* kind.

There is, therefore, no analogy here to the local assessor of property *in presenti* for the ordinary purposes of its taxation.

Congress has not yet taken the *home* market as its standard for ad valorem duties; but relies on its enactments to secure the execution of its prescribed method of ascertaining past foreign values on the fair and reasonable evidence that may prove to be at hand.

The "special tribunal" are therefore *judges* of some general judicial description. These judges are the appraisers. The nature and tenure of their office must therefore be fully considered.

PART SECOND.

IV.

AN APPRAISER IS AN OFFICER. HE CAN ONLY BE APPOINTED BY THE PRESIDENT, OR, IF AN "INFERIOR OFFICER," BY THE HEAD OF A DEPARTMENT OR A COURT OF LAW.

1. The term "officers," as used in the United States Constitution (Art. II., Sec. 2) and Statutes, has a well defined legal signification.

Apart from this signification as expressed in the Revised Statutes, and as judicially declared in numerous classes of cases which have arisen wherever the common law obtains, the ordinary signification of the term "office" is clear and unambiguous. Its popular and legal significations are the same.

It is common speech to say: "Public office is a public trust." Webster defines OFFICE to be "a particular duty, charge, or trust, conferred by public authority, and for a public purpose." An "officer" is the incumbent of an office. The official or unofficial character of a position is to be determined not by the presence or absence of an official designation or of a long term of service; but by the nature of its functions. Nor is the question or amount of pay or emolument a necessary feature of an office. Members of Parliament did not receive pay. General Washington served without emolument. Both popularly, technically and legally were officers. The right to emolument is an incident that might characterize an office, yet it is not essential. "In my opinion," said BEST, CH. J., in Henley *v.* Mayor of Lyme, 5 Bing., 91, "every one who is appointed to discharge a public duty and receives compensation for the same in whatever shape, whether from the Crown or otherwise, is a public officer."

"Every man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits; because it is the duty of the *office* and the *nature* of the duty which makes him a public officer and not the extent of his authority" (*State* vs. *Wilson*, 29 *Ohio St.*, 348).

"The terms 'office and public trust' have no legal or technical meaning distinct from their ordinary signification. An office is a public charge or employment in which the public are interested" (Chancellor, *In re Wood, Hopk.*, 6).

An office is "a right which entitles a man to act in the affairs of others without their appointment or permission." (See Mozley & Whitley's Law Dic., p. 284.) It is "a duty, a charge, a trust, exercised for a public purpose" (32 N. Y., 726). It is "a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private."

The term office "refers to the functions to be performed" (Stone *vs.* U. S., 3 Court Cl., 262).

It is "*that function by virtue whereof a person has some employment in the affairs of another* (Wharton); and it may be public or private or *quasi* public as exercised under public authority, but yet affect only the affairs of particular individuals" (71 N. Y., 243).

"The word *officium* principally implies a duty and in the next place the charge of such duty; and it is a rule that *where one man hath to do with another man's affairs against his will and without his leave, that is an office, and he who is in it is an officer*" (Carthew's Rep., 478–9).

Offices "consist in a right and corresponding duty to exercise a public or private trust and to take the emoluments belonging to it" (3 *Kent Com.*, 454).

"An office is defined to be," said Ch. J. Marshal (1823) in *U. S.* vs. *Maurice*, 2 *Brock*, 102, "'a public charge or employment,' and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States" * * * unless it be a mere employment contract. "But if a duty be a continuing one, which is defined by rules prescribed by the Government and not by contract, *which an individual is appointed by Government to perform, who enters on the duties appertaining to his station without any contract defining them, if these duties continue though the person be changed*, it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer." In that case the army regulations had provided for the appointment and had defined the duties of agents of fortifications. They were governed by the Engineer Department, and were directed to do certain things. These offices were established, in the first instance, only by army regulations, although they were necessarily recognized in subsequent legislation approving and adopting such regulations. "A very superficial examination of the laws," says Marshal, "will be sufficient to show that duties of this description, *if not performed by contract*, are performed by persons who are considered as officers of the United States, whose offices are established by law." So the *office* of agent of fortifications was held to exist. In the case at bar there can be no such question as the existence of the office. It is in terms created by the Act of Congress. It is an office having a name with prescribed qualifications for its incumbent, precise duties defined and limited by statute, extensive powers affecting the rights of the sovereign and the liabilities of the subject, and having official jurisdiction, authority and action, which is exclusively measured by legislative enactments. The rights, duties and powers of the office rest and continue to each several or successive appointee on his taking the oath of office. This oath marks the measure of his duty and denotes the absence of any contract relation concerning it.

"Those who perform duties under contracts are not regarded as officers, but *those who act under law prescribing and regulating their duties concerning even a portion of the public seem to be considered officers*" (7 Bacon, 279–280).

When the Legislature imposes on the executive department specific duties, and directs peremptorily the performance by the executive of certain acts, when the rights of individuals, as well as of the Government, depend on the performance of those acts, he, the executive officer, is the officer of the law and is amenable to the law. (*See Sergt. on Constn., Ch.* 31.)

In pursuing his functions and reaching his official conclusions, the officer, in the case at bar, is governed exclusively by the acts of Congress. He is no clerk, agent or representative of any person or of any other officer. He is subordinate in his determinations to no other office. His judgments are "final." In his own person and official doings, he represents that portion of the sovereign power delegated to his office by the authority that established it. His office is his chart. He is not a contractor. He sells nothing. He produces nothing. He only serves the public as prescribed by the public laws by which alone he is controlled.

It has been said that a "manifest difference exists between an *office* and an *employment* under the Government. We apprehend that the term "office" implies a delegation of some portion of the sovereign power to and possession of it by, the person filling the office, and the exercise of such power within the legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the great departments of of government, legislative, judicial or executive or sometimes to another. Still it is a legal power which may be rightfully exercised, and in its exertion it will bind the rights of others and be subject to revision and correction only according to the standing laws of the State. An *employment* merely has none of these distinguishing features." * * * "It appears then that EVERY OFFICE in the constitutional meaning of the term implies AN AUTHORITY TO EXERCISE SOME PORTION OF THE SOVEREIGN POWER either in making, executing or administering laws."

If the conclusions of these appraisers are incontestable they may practically make, construe and administer the laws, as well as impose individual taxation beyond the point of confiscation. The power to impose a tax, a penalty, and to measure the *quantum* of both through this appointee's signature is an exercise of the highest attribute of sovereignty, next to the power over life. What "officer" of the Republic exerts a higher prerogative? To whom or to what are they "inferior?"

2. Although every office is an employment, yet there are many employments which do not come under the denomination of offices, being ordinary engagements or contracts, *e. g.*, to make hay, to plough parks, to light a building, to furnish supplies, to construct vessels or implements of war, to carry the mails under executive supervision. Yet Congress may create offices charged with any of these duties and apportion the ministerial machinery for the purpose. The *offices* may endure for

the season, the day, or exclusively for "the job." They would be none the less offices, and their incumbents "officers," governed by law and by established regulations. They would be a part of the Civil Service of the United States, and owe their selection to constitutional authority. Congress could not select them, or authorize their selection except as provided by the Constitution.

There is no appointing power, it must be conceded, except as the Constitution provides for it; and that is the equivalent of stating that the incumbents of any offices created by Congress shall not be otherwise selected than by the President, Heads of Departments and Courts of Law.

The constitutional power of Congress to levy taxes means that duties shall be levied pursuant to law, by officers amenable only to law, and deriving their authority exclusively from stipulated constitutional sources. The acts of all officials in the taxation machinery of the Government must necessarily be purely ministerial, else the autonomy of the judicial and legislative departments would not be preserved against the intrusions of the executive. The validity of these ministerial acts must be decided by the legal principles which govern all acts of this character; and the principles are to be determined by the judiciary.

These principles require that the organic law, the statutes and the executive performances shall always harmonize and exactly coincide.

This would not be possible under a taxing scheme which was the totality of petty contracts, bargainings of employees, wanton acts of agents, of sub-agents and general irresponsible official determinations touching the amount of duties; instead of a careful system of laws and uniform regulations by which every act in the machinery for revenue is officially measured and subjected to judicial scrutiny. It is impossible to place any legal factor in this system beyond the well-established line of *offices*.

Every distinctive performance in operating the machinery established for the customs revenue is necessarily the act of some officer of the Civil Service.

So authoritatively is this principle recognized that there is no employee, however humble, in the whole range of Custom House operations (even to the day laborers in the public stores) whose appointment is not recorded over the signature or approval of the Secretary of the Treasury.

3. As to whether these special appointees of the Collector to appraise, are *principal* officers or "*inferior* officers" with regard to that distinctive constitutional term need not in this case be determined. It is sufficient that they are "officers" in the *Civil* Service, as distinguished from the military and naval service of the United States.

If "inferior," to whom or to what are they subordinate? In their conclusions, to none. Over their judgments even the "Head of the Department" has no voice.

As between the three sources of constitutional appointment some occasions have arisen to consider this section.

In Collins' case, 14 Court of Claims, 574, referring to this section of the Constitution, it was said:

"It would be impossible to define exactly and arbitrarily the meaning of the words 'inferior officers' in their application to officers of the different branches of the public service who have no official relation to each other; and it would not be easy to separate all the officers of the Government into two classes and draw a satisfactory line which would divide the inferior, in the sense in which it is claimed that word is used, from those of the higher class, nor is it necessary to attempt to do either. In our opinion, the words, as used in connection with the other language of the same clause, have a plain, definite and intelligible meaning capable of unmistakable application to effect the purposes of that provision of the Constitution. Having specified certain officers, ministers, consuls and judges of the Supreme Court who shall be nominated by the President and appointed by and with the advice and consent of the Senate in all cases, the Constitution leaves it to Congress to vest in the President alone, the courts of law or heads of departments the appointment of any officer inferior or subordinate to them respectively, whenever Congress thinks proper to do so. Thus, it may authorize the President or the head of the War Department to appoint an army officer, because the officer to be appointed is inferior to the one thus vested with appointing power (?). The word inferior is not here used in that vague, indefinite and quite inaccurate sense which has been suggested—the sense of petty or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointing may be vested—the President, the Courts of Law and the heads of departments. It is a word having definite relations to a superior; 'subordinate,' 'lower in place, station or rank' are the principal significations given to it by lexicographers (Worcester, Webster, &c.). Bouvier defines it to mean 'one who in relation to another has less power and is below him; one who is bound to obey another.' (Bouvier's Law Dictionary).

Mr. Justice THOMPSON, speaking for the Supreme Court, in *ex parte* Hennen (13 Pet., 258) said: "The appointing power here designated in the latter part of the sections was no doubt intended to be exercised by the department of the Government to which the officer to be appointed most appropriately belonged.

The Constitution contemplates that Congress will provide how all such inferior officers shall be appointed, and requires them to be nominated by the President and appointed by and with the advice and consent of the Senate only when Congress omits to make any other provision therefor.

Whenever, therefore, Congress thinks proper to vest in the President alone, in a court of law, or in the head of a department, the appointment of their respective subordinate officers other than those named in the clause under consideration, or whose appointment is otherwise provided for by the Constitution, it must be held that such officers are inferior officers within the meaning of the Constitution, whose appointment in that manner Congress has the power to authorize; and the Act of Congress must be respected and enforced by the executive officers of the Government and by the Courts."

So MILLER, *J.*, in *U. S.* vs. *Germaine*, 99 *U. S.*, *p.* 509, said:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when officers became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that in regard to officers inferior to those specially mentioned, Congress might by law vest the appointment in the President alone, in the courts of law, and in the heads of departments. That *all persons who can be said to hold an office under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.*" It was therefore held in construing a statute punishing officers of the United States guilty of extortion, that a civil surgeon appointed by the Commissioner of Pensions to examine pensioners and applicants for pension, "*where he shall deem an examination by a surgeon appointed by him necessary,*" were only agents of the Commissioner, to be ap-

pointed or removed at his pleasure, "to procure information needed to aid him in the performance of *his own* official duties." Had Congress said a commissioner might appoint a man to furnish fuel at a price high enough to secure its delivery, "he would have as much claim to be an officer of the United States as the surgeons appointed under this statute." Had Congress designed to punish "others than the officers as defined by the Constitution," words to that effect would have been used, such as "as servant, agent, person in the service or employment of the Government," as has been done where so intended. This surgeon was not a constitutional appointee, and hence was not an "officer of the United States" amenable to punishments provided only for *officers*.

Most of the punitive statutes in terms apply to officers, clerks, agents or persons in the employ of the civil service; and the cases arising thereunder do not attempt to construe the *constitutional* term "officer."

Under the Constitution an officer of the United States is one having the constitutional commission. If Congress creates an office, it cannot be filled except by a person having such constitutional commission, in the absence of which the *officer* cannot exercise lawful power. Congress must, therefore, shape its legislation so as to fill the offices it creates by constitutional selection, or its legislation is nugatory.

In U. S. *v.* Monat, 124 U. S., 307, it is said: "What is necessary to constitute a person an officer of the United States in any of the various branches of the service has been fully considered by this Court in U. S. *v.* Germaine, 99 U. S., 508. In that case it was distinctly pointed out that under the Constitution of the United States all *its* officers were appointed by the President by and with the advice and consent of the Senate, or by a Court of law or the head of a department; and the heads of the Departments were defined in that opinion to be what are now called members of the cabinet. Unless the person in the service of the Government, therefore, holds his place by virtue of an appointment by the President or of one of the Courts of Justice, or heads of Department authorized by law to make such appointment, he is not, strictly speaknig, an officer of the United States. We do not see any reason to review this well-established definition of what it is that constitutes such an officer."

So in U. S. *v.* Smith, 124 U. S., 552: "An officer of the United States can only be appointed by the President and with the advice and consent of the Senate or by a court of law or the head of a department. A person in the service of the Government who does not derive his position from one of these sources is not an officer, in the sense of the Constitution. This subject was considered and determined in U. S. *v.* Germaine, &c., and in the recent case of U. S. *v.* Monat. What we have here said is but a repetition of what was there authoritatively declared."

The merchant appraiser is "a person in the service of the United States," pursuing statutory functions. He does not "derive his position from one of these (constitutional) sources."

Nevertheless, does he not exercise an office? That is the single issue.

Now, if an Act of Congress establishes *an* OFFICE and provides that it may be filled from time to time—say every other day—by

an appointee of the collector, and in no other way, there cannot be any *constitutional* officer, or office.

The Constitution is not to be measured by the statue, but the statute is to be measured by the Constitution.

Suppose Congress should enact that the collector should appoint one collector of duties on sugars, another collector for silks, another for woolens, and so on, and that by the rates fixed in the final certificates of such appointees, "duties should be levied accordingly," would not such appointees be officers?

The constitutionality of such a statute could not be upheld on the ground that the *collector* appointed the incumbents and, therefore, they were not *constitutional* officers. Such a construction would defeat the express restriction of the appointing power.

Suppose Congress should enact that the collector should appoint a surveyor, collector or appraiser, at any city in his district, on the request of two or more citizens, for, say one year, or one week, or one day, or as to one cargo. Such an appointee would undoubtedly exercise an *office.*

If Congress may do such things it may escape its constitutional limitations through some statutory legerdemain, shifting the duration of official functions or the tenures of individuals performing them.

If Congress can do this, it can distribute offices innumerable through other than constitutional sources.

Of course, therefore, it will not answer to say that this merchant appraiser is not an "officer" *because* not a constitutional appointee. That is begging the very question as to whether the statute does not in letter and intent establish an *office;* for if it does it is unconstitutional, because of its method of selecting the incumbent.

Deputy collectors and other subordinates of collectors and appraisers have always been appointed by or with approval of the Secretary of the Treasury, although sometimes on stipulated recommendation of the officer under whom they are to serve; but never absolutely by the latter, no matter what the special service to be rendered. This has been the uniform practice of the Government under all statutes, except as to merchant appraisers, in respect to which the collector's patronage has been in recent years exclusive and extensive as well as unconstitutional.

That the practice of approval by the Secretary was based on the fundamental law is further apparent from the uniform current of authority expressed by the law advisers of the Government, as well as by reference to the successive Acts of Congress, in its various enlargements of the Civil Service to meet the growth of public business.

For illustration, see 11 *Opinion Atty.-Genl.*, 210. By Act of Congress in March, 1865, Internal Revenue assistant assessors were to be appointed by assessors; and the act repealed so much of the Act of 1864 as conferred on the Secretary of the Treasury

the power of appointment, with the approval of the Commissioner of Internal Revenue, of assistant assessors.

"The law, therefore, established an office without designating any competent public authority as authorized to appoint the officer."

In rendering his opinion the Attorney-General says:

"The legal character of the place is, therefore, the first point for determination." He asks: "What is the nature of his (assistant assessor's) duties?" One point of inquiry would be whether they are the *duties of another which he performs in right of and by deputation from that other?* They are not of that character. The statute carefully prescribes the sphere of his authority, but within that sphere he performs the duties and exercises the powers devolving upon him in subordination and *under responsibility only to the law, whose agent in truth he is.* The assessor may re-examine and rectify his assessments" (no one can re-examine or rectify the merchant appraiser's assessments), "but only as a Court of Error may revise and correct the decisions of inferior tribunals on appeal. I have no difficulty, then, in determining that an assistant assessor is an 'officer' in the meaning of the Constitution. The tests that I have applied in ascertaining the legal character of his employment were adopted with like result in the case of inspectors of the customs under the Acts of 1799 and 1815 by my predecessors Mr. Wirt, Mr. Berrien and Mr. Legare. All of these distinguished gentlemen were of opinion that the *inspectors* contemplated by these statues were to all intents and purposes *officers* of the United States, and *not* the *deputies*, employees or agents *of* the *collectors.*" So that if the Act of 1799 contemplated appointment of occasional inspectors by collectors, it was held by Mr. Legare, Attorney-General, to be null and void, and capable only of being constitutionally upheld on the construction that the statute contemplated the Secretary of the Treasury as the appointing power.

4. "The constitutional provisions must be construed as excluding all other modes of appointment."

In 13 Opinion Atty.-Genl., 518 (A. T. Akerman), it is well said:

"If appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the person or body in whom the appointing power is vested by the Constitution, and a mode of selection which gives no room for the exercise of that will is inadmissible. * * * Viewing the appointing power conferred in the Constitution as a substantial and not merely a nominal function, I cannot but believe that the judgment and will of the constitutional depository of that power should be exercised in *every appointment.* The power was lodged where it is because the makers of the Constitution, after careful consideration, thought that in no other depositories of it could the judgment and will to make proper appointments so certainly be found. They assigned it to functionaries who were expected to have an adequate knowledge of men and of affairs, to have capacity for public business, and to feel responsible to conscience and to the opinion of good citizens. As a further security, they placed the power in the hands of those who would have a particular interest in using it well. If a legislative body is ill officered, the members cannot do their work with ease or advantage; therefore, each branch

of Congress chooses its officers. Without efficient servitors a court of law is impotent; therefore, Congress may vest appointments in the courts. The first need of the head of a department is a body of capable and trusty assistants; therefore, Congress may vest appointments in the heads of departments. In all cases not thus provided for the appointment is with the President, where success in his weighty charge essentially depends on the competency of appointees. Thus *the reasons for the constitutional provision all forbid that any judgment and will but those of the constitutional appointing power should have legal operation in the matter of appointment.* * * * The argument has been made that the unquestioned right of Congress to create offices implies a right to prescribe qualifications for them. This is admitted" (*e. g.*, that an appointee is to be a "discreet and experienced merchant"). "But this right to prescribe qualifications is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. The parts of the Constitution which confer this power are as valid as those parts from which Congress derives the power to create offices, and one part should not be sacrificed to the other. *An office cannot be created except under the conditions that it shall be filled according to the constitutional rule.* The legislation of the country from an early period has been supposed to authorize a different constitutional view from that which is herein expressed. * * * But when a congressional construction is inconsistent with the plain meaning of the Constitution as ascertained by authoritative canons, that meaning cannot be overruled by such construction, how often soever repeated. Congress has at various times authorized appointments independently of the President, courts of law or heads of departments, in departmental bureaus, in the customs service, in the land offices and in some other branches of the civil service. Upon this legislation it may be observed: First, that in some cases, such as those of deputy marshals and deputy clerks, the persons appointed are *representatives of the officers who appoint them* and who in some particulars are responsible for their conduct, and perhaps it was considered by Congress that the office was substantially in the principal" (not so with merchant appraisers). "Second, that it was no doubt considered by Congress that some of the persons whose appointments were thus provided for were not officers in the constitutional sense of the term. *Many employments now universally held to be offices were not esteemed such at the outset, but with the growth of the Government were raised to that rank.* Thus the force of legislative precedents is somewhat weakened. Yet it cannot be denied that some of them take for granted that Congress is absolute in the matter of appointments. *Such, however, is not the constitutional rule.* Congress has power to distribute at its pleasure the appointment of inferior officers between the President, courts of law and heads of departments, or to vest such appointments exclusively in one or two depositories; but it has no power to vest appointments elsewhere, directly or indirectly. * * * It more concerns us to ascertain what is the constitutional rule than to learn whether that rule has always been observed. Nineteen violations of the Constitution do not justify a twentieth."

In 4 *Op. Atty.-Genl.*, 164, H. S. LEGARE, Atty.-Genl., said:

"CONGRESS HAD NO POWER TO VEST THE APPOINTMENT OF ANY EMPLOYEE COMING FAIRLY WITHIN THE DESIGNATION OF AN INFERIOR OFFICER OF THE GOVERNMENT IN ANY OTHER PUBLIC AUTHORITY BUT THE PRESIDENT, THE HEADS OF DEPARTMENTS OR THE JUDICIAL TRIBUNALS, AND THEREFORE THE COLLECTOR COULD NOT APPOINT *occasional* INSPECTORS. The opinions of my predecessors concur in establishing that *occasional inspectors* as well as permanent inspectors are to all intents and purposes *officers* of the United States, not mere occasional deputies, employees or agents of the collector. The individual's name is to be submitted to and approved by the Secretary of Treasury."

In the earliest revenue act (1799) there was a provision for a *per diem* compensation (U. S. R. S., Sec. 2733) to persons employed by the collector in aid of the customs; but such persons were employed under the special approval of the Secretary of the Treasury, who, by later acts (*e. g.*, Laws 1822, Ch. 107), should

"from time to time limit and fix the number and compensation of the clerks to be employed by any collector," etc. In construing such an act it seemed to be conceded that those so employed were officers (see U. S. *vs.* Morse, 3 Story, 90). The necessity of appointing all customs employees by the head of the Treasury Department, when not appointed by the President, has always been recognized, and during recent years has been punctiliously practiced. In 1817 persons employed by the collector were by statute declared to be officers of the customs (3 Stat. at L., 397, Sec. 7).

That a deputy or agent—a mere employee without authority in his own name or certification, but only in the name of another, and acting exclusively as representing his superior officer—should be regarded as an "officer," while the sworn members of a tribunal established by law, pursuing a statutory procedure, with powers to take testimony and to establish debts, and reaching independent and incontestible certifications and judgments, should *not* be regarded as officers, is a proposition that refutes itself.

5. *This tribunal is composed of appointees whose duties prescribed by law are to be performed by them alone, and not in right of or by deputation from another.*

The merchant appraiser is *not* the representative of the Collector. The Collector has no right to appraise, except in the single case of disagreement within the Board. Merchant appraisers are the appraisers; he is a valuation officer. The Collector has no power to exact *ad valorem* duties when the importer is dissatisfied, except by virtue of the official values and signatures of the re-appraisers. The Secretary himself could not direct him to take lower or different values; nor remove the Collector's appointees. They are *above* any officer whatever in their office, and their office extends to as many cases as the Collector may send them. The case at bar is *one* appraisment out of several made by *one* officer under *one* appointment and *one* oath of office. The Collector likewise may send to the same pair of appointees all the cases of one day, one week, one month, or one year. He may send all the importations of one house uniformly to a pair of its competitors. Such a discretion is beyond the limits of constitutional possibility.

In a common law sense such an office is higher and in nowise "inferior" to the "head of a department," or even a "Court of law;" and its incumbent, it might almost seem, should be fortified by the constitutional warrant even of an appointment by the President, confirmed by the Senate. Congress arrived at that opinion by the Act of June 10, 1890. [Known as "Customs Administration Act."]

In 8 *Opin. Atty.-Genl.*, 41, it was well said by Mr. Cushing that the power of appointment could not be communicated by Act of Congress to persons not named to that end in the Constitution. The case was where an Act of Congress had authorized the President to appoint a Commissioner to whom, together with

another Commissioner *to be appointed by the Mayor of* Baltimore, he should refer the question of a selection of a post office site; and if said Commissioners should disagree they should choose a third, and if the President approve their decision his approval should be final, and if not he should refer it to Congress. Is the thing which the President is authorized to do legally a thing which is possible to be done? * * * That thing "is *the appointment of three agents* through whom the President is *to investigate and determine the elements of an executive act to be performed.* Now how is the President to exercise this appointing power in copartnership with the Mayor of Baltimore?" How can Congress bestow any part of the appointing power on the Mayor of Baltimore? If this were a mandatory condition it could not be executed by the President.

Now Sec. 2930, U. S. R. S., is mandatory on the Collector. *He* is obliged under the statute to appoint a "tribunal," upon whose certification "duties shall be levied accordingly." The Constitution will not permit any United States tribunal to be created in that way. The Collector is not at liberty (Sec. 2930) to send the case for further proceedings before some constitutional tribunal; but he must "select one discreet and experienced merchant, to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and *appraise* the same *agreeably to the foregoing provisions;* and if they shall disagree the Collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly."

6. It will be observed that even with respect to the General Appraiser, as the possible half of the tribunal to be appointed by the Collector, that officer, by virtue of his commission, had no power under any Act of Congress to certify to an appraisement. He is not appointed by the President for that purpose. He is appointed as an assistant of the Secretary, "to protect and insure "uniformity in the collection of revenue" (Sec. 2608), without power, except by direction of the Secretary, in visiting special ports to "ASSIST" the regular appraisers, among whom are these "discreet and experienced merchants." The whole scheme of confidence in the Collector as to these appointments is constitutionally vicious, and is not cured because one of these four general visiting officers may, perchance, be designated by the Collector as a possible half of a "tribunal" otherwise certainly unconstitutionally created. Both members of this tribunal may be the exclusive appointees of the Collector.

In the case at bar the Collector followed the Government practice and omitted to appoint any general appraiser or any associate whatever to act with Mr. McCreery, so that the tribunal was not even constituted according to the statute. The Collector did not appoint any designated general appraiser for this appraisement (Recs., fols. 85, 76, 136).

7. In 34 N. Y., 398, the foregoing description of what constitutes an office was applied to Commissioners to lay out a road, who were said to be officers. Commissioners appointed by the Governor, to superintend the construction of a building, are officers under Sec. 16, Art. 4, N. Y. Constitution, which provides that where the duration of an office is not prescribed by the Constitution it may be declared by law, and when not so declared shall be during the pleasure of the appointing power (citing 20 Wend., 595). So a collector of a village tax, appointed by village trustees, was held to be a public officer because he was entrusted with a public duty. "*It is the charge or duty of the position, and not the mode of appointment that determines whether the position is an office or a simple employment*" (34 *N. Y.*, 399).

The performance of a single function of a public character by an individual, acting by virtue of a statute and under public authority has been held to constitute an office and its incumbent an officer within the purview of United States law. In two circuits it has been held that the duties of receivers of national banks "not being defined by any contract but by law and rule prescribed by the Government, those receivers are *officers* of the government which appoints them."

Incidentally in so holding it was noticed that they were appointed by the Comptroller of the Currency acting under special approval of the Secretary of the Treasury, else, being public officers their appointments might be objectionable as not coming from the head of a department. That the statutes respecting these receivers could only be upheld by such a construction as harmonized the appointing power with the constitutional requirement ("head of department"), lends additional weight to the expressions at circuit in the two cases of Platt *vs.* Beach, 2 Ben., 316, and Price *vs.* Abbott, 17 Fed. Rep., 507, as judicial expositions of the term "*officer.*"

In *Wise* vs. *Withers*, 2 *Cr.*, 336, MARSHAL, Ch. J., in declaring a justice of the peace who had powers partly executive and partly judicial—an officer of the United States—said: "A distinction has been attempted between an officer of the United States and an officer of the Government of the United States, confining the latter more especially to officers who are considered as belonging to the high departments, but in this distinction there does not appear to the Court to be a solid difference."

Even a sail-maker at the Washinghton Navy Yard in 1813, appointed only by the Secretary of the Navy, in a case where the President only was authorized to appoint, was held to be an officer of the United States, in Sanford *vs.* Boyd, 2 Cr. C. C., 78; and a clerk in the Treasury Department was held to be "an executive officer of the United States" in *Ex parte Smith, Ibid.*, 694.

8. *The disposition of the subject-matter determines the office, so that in fact and in law the office may exist and continue even for the purposes of a single transaction.*

There are many stations where duration of tenure is not chronologically fixed. The time occupied is often mentioned

as an incident of office; but has never been pronounced an essential characteristic, except in the sense that a service even in connection with a single subject-matter must require *some* time for its performance.

IT IS THE CHARGE OR DUTY OF THE POSITION, ITS FUNCTIONS, ITS ATTRIBUTES AND OBLIGATIONS AS DEFINED BY LAW, AND NOT BY CONTRACT OR BY PERSONAL DEPUTIZATION, AND FINALLY IT IS THE EFFECT OF THE DETERMINATIONS OF THE OCCUPANT OF THE STATION AND THEIR OPERATIONS UPON THE RIGHTS OF OTHERS, THAT CHARACTERIZE A STATION AS AN OFFICE AND ITS INCUMBENT AS AN OFFICER.

Every *necessary* step in the machinery of imposts is the act of a Government officer.

Surely the authorities cited do not warrant the proposition that no station is an office unless held for a *specified* time. Scores of offices are held exclusively subject to termination at the will of the appointing power; others, although nominally for a fixed term, as four years, are equally at its will. Other offices are dependent in duration upon the "subject-matter" over which they exert authority. Other officers, again, like customs inspectors, may or may not be actually employed, but are paid only for the days they render service. So also are merchant appraisers on reappraisement paid by the day according to the number of days they are actually engaged on the reappraisements. These days may extend, as they often do, through a period of months. Thus in New York, an instance occurred where the same merchant was merchant appraiser, acting at one time on more than thirty invoices. It took more than six months to dispose of these invoices on reappraisement; and, of course, therefore, during this entire period the office of merchant appraiser was continuously held by the merchant referred to. The merchant appraiser in the instance at bar held his office for an unknown number of cases and for an indefinite period of time (Rec., fol. 91).

At the collector's option this officer could have been furnished with continuous engagements and innumerable invoices covering the collector's term of office.

Moreover, there is nothing in the statute that restricts the appraiser to a single transaction. Standing appraisers may be appointed by the collector to whom all the invoices of a firm, of a day, of a month, or of a season shall be referred.

It requires no argument to show that if in *one* case, Congress can depute a public function to be performed in particular places, or upon particular subject-matters, by the appointee of an unconstitutional subordinate, it can do so in many cases, or in all cases; and thus Congress might disperse the entire Federal machinery. It might distribute the various governmental performances required here and there among the temporary servants or independent appointees of a host of irresponsible subordinates; and thus the whole scheme of a responsible constitutional source of appointment would speedily be eliminated from the system of our Federal administration.

The deposit of a power of this magnitude even with the head of a department, awakened the fears of Judge Story, who in commenting thereupon said (Story on Constitution, Sec. 1536):

"In the practical course of a government there does not seem to be any exact line drawn who are and who are not to be deemed INFERIOR officers in the sense of the Constitution, whose appointment does not necessarily require the concurrence of the Senate. In many cases of appointments, Congress have required the concurrence of the Senate, where perhaps it might not have been easy to say that it was required by the Constitution. The power of Congress has been exerted to a great extent under this clause in favor of the Executive Department. The President is by law invested either solely or with the Senate with the appointment of all military and naval officers, and with the most important civil officers, and especially of those connected with the administration of justice, the collection of REVENUE and the supplies and expenditures of the nation. The courts of the Union possess the narrow prerogative of appointing their own clerk and reporter without any further patronage. The heads of departments are in like manner generally entitled to the appointment of the clerks in their respective offices. But the great anomaly in the system is the enormous patronage of the Postmaster-General, who is invested with the sole and exclusive authority to appoint and remove all deputed postmasters, and whose power and influence have thus by slow degrees accumulated until it is perhaps not too much to say that it rivals, if it does not exceed, in value and extent that of the President himself.

How long a power so vast and so accumulating shall remain without any check on the part of any other branch of the Government, is a question for statesmen and not for jurists. But it cannot be disguised that it will be idle to impose constitutional restraints upon high executive appointments if this power which pervades every village of the Republic and excites an irrisistible though silent influence in the shape of office, or in the no less inviting form of lucrative contracts, is suffered to remain without scrutiny or rebuke. It furnishes no argument against the interposition of a check which shall require the advice and consento f the Senate to appointments, that the power has not hitherto been abused. In its own nature the Post-office establishment is susceptible of abuse to such an alarming degree; the whole correspondence of the country is so completely submitted to the fidelity and integrity of the agents who conduct it; and the means of making it subservient to mere state policy are so abundant, that *the only surprise is that it has not already awakened the public jealousy and been placed under more effectual control. It may be said without the slightest disparagement to any officer who has presided over it, that if ever the people are to be corrupted or their liberties are to be prostrated, this establishment will furnish the most facile means and be the earliest employed to accomplish such a purpose.*"

Such dire prophecy of the great commentator has happily not yet been fulfilled. Had his prophetic vision, however, extended to the possibility that Congress might deputize any local representative of the great executive departments of the Government to appoint, not as his own subordinate, but as the independent representative of the law to be executed, any person he might select for any term of official duty, or to act touching the private interests of any one piece of property, or of any one individual; and further, that the local representative of a great department might multiply such appointments so that each official act should be performed by a different person; or further, that every tax should be assessed by a different person selected for that special assessment against the single individual taxed; or that no assessment whatever should be made by the officer holding a Presidential appointment; or that all assessments should be made by persons holding no other commission than

as an incident of office; but has never been pronounced an essential characteristic, except in the sense that a service even in connection with a single subject-matter must require *some* time for its performance.

IT IS THE CHARGE OR DUTY OF THE POSITION, ITS FUNCTIONS, ITS ATTRIBUTES AND OBLIGATIONS AS DEFINED BY LAW, AND NOT BY CONTRACT OR BY PERSONAL DEPUTIZATION, AND FINALLY IT IS THE EFFECT OF THE DETERMINATIONS OF THE OCCUPANT OF THE STATION AND THEIR OPERATIONS UPON THE RIGHTS OF OTHERS, THAT CHARACTERIZE A STATION AS AN OFFICE AND ITS INCUMBENT AS AN OFFICER.

Every *necessary* step in the machinery of imposts is the act of a Government officer.

Surely the authorities cited do not warrant the proposition that no station is an office unless held for a *specified* time. Scores of offices are held exclusively subject to termination at the will of the appointing power; others, although nominally for a fixed term, as four years, are equally at its will. Other offices are dependent in duration upon the "subject-matter" over which they exert authority. Other officers, again, like customs inspectors, may or may not be actually employed, but are paid only for the days they render service. So also are merchant appraisers on reappraisement paid by the day according to the number of days they are actually engaged on the reappraisements. These days may extend, as they often do, through a period of months. Thus in New York, an instance occurred where the same merchant was merchant appraiser, acting at one time on more than thirty invoices. It took more than six months to dispose of these invoices on reappraisement; and, of course, therefore, during this entire period the office of merchant appraiser was continuously held by the merchant referred to. The merchant appraiser in the instance at bar held his office for an unknown number of cases and for an indefinite period of time (Rec., fol. 91).

At the collector's option this officer could have been furnished with continuous engagements and innumerable invoices covering the collector's term of office.

Moreover, there is nothing in the statute that restricts the appraiser to a single transaction. Standing appraisers may be appointed by the collector to whom all the invoices of a firm, of a day, of a month, or of a season shall be referred.

It requires no argument to show that if in *one* case, Congress can depute a public function to be performed in particular places, or upon particular subject-matters, by the appointee of an unconstitutional subordinate, it can do so in many cases, or in all cases; and thus Congress might disperse the entire Federal machinery. It might distribute the various governmental performances required here and there among the temporary servants or independent appointees of a host of irresponsible subordinates; and thus the whole scheme of a responsible constitutional source of appointment would speedily be eliminated from the system of our Federal administration.

The deposit of a power of this magnitude even with the head of a department, awakened the fears of Judge Story, who in commenting thereupon said (Story on Constitution, Sec. 1536):

"In the practical course of a government there does not seem to be any exact line drawn who are and who are not to be deemed INFERIOR officers in the sense of the Constitution, whose appointment does not necessarily require the concurrence of the Senate. In many cases of appointments, Congress have required the concurrence of the Senate, where perhaps it might not have been easy to say that it was required by the Constitution. The power of Congress has been exerted to a great extent under this clause in favor of the Executive Department. The President is by law invested either solely or with the Senate with the appointment of all military and naval officers, and with the most important civil officers, and especially of those connected with the administration of justice, the collection of REVENUE and the supplies and expenditures of the nation. The courts of the Union possess the narrow prerogative of appointing their own clerk and reporter without any further patronage. The heads of departments are in like manner generally entitled to the appointment of the clerks in their respective offices. But the great anomaly in the system is the enormous patronage of the Postmaster-General, who is invested with the sole and exclusive authority to appoint and remove all deputed postmasters, and whose power and influence have thus by slow degrees accumulated until it is perhaps not too much to say that it rivals, if it does not exceed, in value and extent that of the President himself.

How long a power so vast and so accumulating shall remain without any check on the part of any other branch of the Government, is a question for statesmen and not for jurists. But it cannot be disguised that it will be idle to impose constitutional restraints upon high executive appointments if this power which pervades every village of the Republic and excites an irrisistible though silent influence in the shape of office, or in the no less inviting form of lucrative contracts, is suffered to remain without scrutiny or rebuke. It furnishes no argument against the interposition of a check which shall require the advice and consento f the Senate to appointments, that the power has not hitherto been abused. In its own nature the Post-office establishment is susceptible of abuse to such an alarming degree; the whole correspondence of the country is so completely submitted to the fidelity and integrity of the agents who conduct it; and the means of making it subservient to mere state policy are so abundant, that *the only surprise is that it has not already awakened the public jealousy and been placed under more effectual control. It may be said without the slightest disparagement to any officer who has presided over it, that if ever the people are to be corrupted or their liberties are to be prostrated, this establishment will furnish the most facile means and be the earliest employed to accomplish such a purpose.*"

Such dire prophecy of the great commentator has happily not yet been fulfilled. Had his prophetic vision, however, extended to the possibility that Congress might deputize any local representative of the great executive departments of the Government to appoint, not as his own subordinate, but as the independent representative of the law to be executed, any person he might select for any term of official duty, or to act touching the private interests of any one piece of property, or of any one individual; and further, that the local representative of a great department might multiply such appointments so that each official act should be performed by a different person; or further, that every tax should be assessed by a different person selected for that special assessment against the single individual taxed; or that no assessment whatever should be made by the officer holding a Presidential appointment; or that all assessments should be made by persons holding no other commission than

the warrant for that purpose of a local officer:—in these events Mr. Justice Story may justly have feared the dispersion of the Federal machinery, its conversion into the worst forms of irresponsible administration, and an absolute destruction of the finely balanced constitutional system which for a century has been the pride of the Republic.

9. This OFFICE of merchant appraiser as such is not only recognized by the highest officers in the Executive Department, but its governmental functions have been made the frequent subject of recent official and legislative consideration. The Honorable Secretary of the Treasury has placed the duties of these customs reappraisers, and the effect of their acts upon the rights of importers and in the administration of the laws, in comparison with the dignities and attributes of the highest grade of officers. He also has recommended Congress to provide for their appointment by the President and confirmation by the Senate, and that the special tribunal of reappraisers instead of consisting of *collector's* appointees shall consist of three such officers. Thus with reference to the port of New York, and without any necessary change in existing laws, prescribing the duties of these reappraising officers, Mr. Manning recommended, in speaking of this special tribunal, as follows:

"The board should consist of three instead of two, so as to prevent probability of disagreement as when the board consists of only two. The decision of this board should be final, so as to relieve the collector of the reappraising work which is now thrown upon him. I do not think that abandonment of the present plan of selecting a merchant to be a member of the reappraising board will work injustice to importers or consumers *or to the Government.* It will be within the discretion of Congress to make the *tenure of office of the members of this board such as may be thought best.* They can be nominated by the President and confirmed by the Senate, as are justices of the Supreme Court and judges of all other Federal courts. Federal judges sitting in admiralty decide mixed questions of law and fact without the intervention of a jury, and I see no reason why *executive officers may not,* as *reappraisers, be intrusted with functions not more delicate or important.*"

See Special Rep. Sec'y Treas'y to Congress, dated Feb'y 16, 1886.

These recommendations repeatedly renewed have finally received the approval of Congress by the repeal of Section 2930 R. S., and the enactment of the law of June 10, 1890, under which officers with a permanent tenure have been appointed by the President and confirmed by the Senate. These officers are charged by law with duties precisely corresponding to and described in the statutes applicable to the abolished office of merchant appraisers under the obsolete Section 2930.

V.

THE TRIBUNAL ORGANIZED UNDER SECTION 2930, U. S. REVISED STATUTES, IS AN OFFICIAL BOARD. BOTH MEMBERS OF THIS TRIBUNAL ARE UNITED STATES OFFICERS. *They act for and on behalf of and under the constituted authorities of the United States.* This is true in fact and in law, by statute and under the Treasury Regulations, as well as according to the uniform practice.

The duties of the tribunal, the power, jurisdiction and authority of its members, individually and collectively, are fixed by law. Their official conclusions are of superior dignity; and, however carelessly or in disregard of law they may be arrived at, when once established, they are declared to be the results of "due process of law."

Their determinations are, to the collector, "final and conclusive," and by these determinations, according to Section 2930, duties are to be levied, which levy, under Sec. 21, Ch. 193, "Anti-Moiety" Act of June 22, 1874, in the absence of fraud and of protest is "final and conclusive upon all parties." Even when protested against, certain alleged errors of their proceedings, as, for instance, whether they ascertained the wholesale or retail value, or the value in the markets described in the statutes or in some other markets, or whether they considered improper statements, or whether they heard any evidence at all, or, in fact, had any knowledge or information of any sort whatever touching the thing they have certified to, have sometimes been held to be free from extraneous inspection. Authorized only to record opinions resulting from a complicated set of statutes, and supposed to be clothed with statutory power to base those opinions on legal evidence, they may, nevertheless, if their conclusions are final, take illegal evidence, and base their opinions upon mistakes of law or upon unworthy motives, and escape official review and judicial scrutiny. So potential an office was never found in the domain of English common law.

Such is often the practical operation of the law. If Congress had designed any such results it would not have struggled as it has struggled, by successive enactments, to describe the specific duties of these appraisers, to define what they shall *see*, whom they may *summon*, what peculiar *facts they shall ascertain*, how they shall proceed to ascertain such facts, and what items of valuation may and what may not be taken into consideration.

Inventors, when erroneously refused patents, may have certain errors reviewed, ministerially and judicially. The right of settlers under the homestead laws depend on the laws as applied to the facts of their case, not upon the capricious judgments of land-office employees. Shall it be said that there is no way to scrutinize the integrity of a United States *ad valorem* tax

because the collector is shielded by the certificates of his own appointees? Shall valuations by caprice prevail over the statutory valuations?

If this result shall accord with the judicial exposition of existing statutes, then the wisdom of restricting the appointing power to the great offices mentioned in the Constitution is obvious.

By the STATUTES *and by* TREASURY REGULATIONS, *considered either together or separately,* MERCHANT APPRAISERS ARE OFFICERS.

They are incumbents of an office. They are Government appointees (Art. 1415–473), to be governed by the Treasury regulations (Art. 1416, Record, fols. 62, 41). Their certificate is "*the appraisement*" (*Ib.*, fol. 47, Art. 485; and U. S. R. S., Sec. 2950).

Examine their statutory functions:

"All resident merchants appointed according to law to act as appraisers shall severally take and subscribe an oath, diligently and faithfully, to examine and inspect such merchandise as the collector may direct, and truly to report to the best of their knowledge and belief the true value thereof" (U. S. R. S., Sec. 2614); which is substantially the oath prescribed for the appraiser for the port of New York.

Being appointed under Title 34, he "shall before entering on his duties take and subscribe an oath," etc. (Secs. 2616 and 1756). The "oath required to be taken by any person appointed to office under this title shall be taken before the collector of the district" (Sec. 2617), which specific provision is to prevail over general provisions applicable in cases of "disability" (Sec. 2625), "occasional and necessary absence or sickness" (Secs. 2630, 2631).

In the present case the oath was administered by a deputy collector, which was irregular, like the appointment itself.

Congress has itself defined the term "officer." An "officer" under the statutes is, of course, the "officer" mentioned in Sec. 2, Art. II., of the Constitution.

In the statutes, "the reference to any *officer* shall include *any person authorized by law to perform the duties of such office*" (U. S. R. S., Sec. 1).

These appointees are so-called "merchants" appointed according to law to act as appraisers. They act "for or on behalf of the United States, in an official capacity under or by virtue of the authority of a department or office of the Government," and are amenable to the statutes against bribery (Secs. 5501 and 5451). They are by statute authorized "to call before them and examine upon oath any owner, importer or consignee, *or other person*, touching any matter or thing which *they* may deem material in ascertaining the true market value or wholesale price of *any* merchandise imported," and may require the production of papers, etc. (Sec. 2922); and may require witnesses to attend and testify (Sec. 2923); and it is declared perjury to testify falsely before appraisers (Secs. 5392, 2924).

Surely, so potential an officer should receive commission from the President, as appraisers and assistant appraisers are appointed (Secs. 2536, 2608).

Among the duties of these resident appraisers may be mentioned (Sec. 2652) to follow lawful instructions of the Secretary of the Treasury, and in case of difficulty "as to the true construction or meaning of any part of the revenue laws" to obey implicity that officer's decision.

"It shall be the duty of the appraisers of the United States and every of them and every *person who shall act as such appraiser*" * * * "by all reasonable ways and means in his or their power" * * * "to appraise 'the true and actual market and wholesale price in the principal markets of the country from whence exported,' etc.," (Secs. 2902 and 2952).

This must be done, however, by the statutory methods described in U. S. R. S., Secs. 2904, 2905, 2906, 2907, 2910, 2911, 2912, 2913, 2916, 2919, 2921, 2922, 2923, 2927.

These provisions require that *ad valorem* duty shall be levied upon the above-described market "value on the day of actual shipment," as shown by a certified bill of lading* when presented (Sec. 2904); and upon merchandise imported from a country in which it has not been manufactured upon the price of similar articles in the country of manufacture at the period of exportation to the United States (Sec. 2905); and when duty is imposed according to the value of a specified quantity or parcel, the appraisement must be at the wholesale price in the principal markets of the country from which the same has been imported (Sec. 2906); and in determining such values the cost of transportation, packing and certain charges were formerly added (Sec. 2907), while now they are no longer added, but should not be included (Tariff Act, 1883); and when there is expressed an average price in an invoice the duty shall be assessed upon the whole invoice according to its highest item (Sec. 2910); and the best article in wool cases fixes the value (Sec. 2911); and the wool of the best quality carries up the duty of its fellow-wool (Sec. 2912); and no discrimination as to trade-marks shall be made between kid gloves (Sec. 2913). Standards of weights for bushels of various grains are established, by which appraisers must be governed (Sec. 2919), and the right given to summon owners and others and their books and papers to testify touching dutiable value (Sec. 2022); under penalties and "conclusive" appraisements for refusal (Secs. 2923, 2924).

The damage also to imported goods is to be ascertained according to prescribed methods (Sec. 2927).

Should any of these provisions, applicable in any given case, *not be pursued*, by so much *is the procedure illegal.*

Congress did not intend that these careful provisions should be rendered nugatory by the will of any official. On the contrary, the conformity or non-conformity to the Congressional

* This Bill of Lading is not permitted to be seen by the appraisers, but is attached to the entry, and importer's oath, which in practice is withheld from the appraisers inspection!

standards in any given case, is the exclusive measure of the legality of procedure and result applicable to that particular case. If this were not so the direction to appraise "agreeably to the foregoing provisions" would be nugatory; for whether acting originally at ports where there are no other appraisers, or as members of the appraisal tribunal on appeals from damage or other appraisements, the appraisement must be "agreeably to the foregoing provisions (Sec. 2930). Among these provisions is to proceed by all *reasonable* ways and means. Shall not the judiciary scrutinize the method, decide what is "reasonable" and submit the reasonableness of the procedure on reappraisement in any particular case to a jury?

It being protested that "reasonable ways and means" were not pursued, that issue is triable. Hence the Courts should examine the proceedings under unreasonable general instructions from the Secretary of Treasury and test the extent of his official coercion upon the appraisements.

The statute specially enjoins these merchant appraisers that "the mode hereinbefore prescribed of ascertaining the foreign value" * * * "shall be carefully observed by the revenue officers to whom is committed the estimating and collection of duties."

The "two respectable resident merchants who shall be the appraisers of such merchandise," appointed by the Collector, under Sec. 2609, at ports where there are no other appraisers, correspond in functions and duties with the "discreet and experienced" appointees of the Collector under Sec. 2930; the conclusions of the latter are "final" and "duties shall be levied accordingly," as indeed they would be levied in the other case except in event of an appeal. The same statutes direct the procedures and purposes.

The "discreet and experienced merchants," under Sec. 2930, are *the* appraisers (irrevocably) of the importations regularly before them; and of as many more importations as the Collector may choose to send to them out of the "dissatisfied" appraisements occurring during his term of office. In this case the merchant appointee was *the* appraiser of many importations.

The official character of these merchant appraisers in the performance of the public duty assigned to them corresponds in all respects with that of the appraiser of the port whose conclusions they review. The certificate of *one* appraiser is of no higher dignity than the certificate of any other one appraiser in respect to an importation regularly before him. Nor does it help the merchant appraiser's warrant that he *may*, under Sec. 2930, act in "association" with an officer commissioned by the President.

Congress cannot constitutionally create a tribunal, one member of which shall be named by the President and one member appointed by the Mayor of Baltimore. Such a statute would be vicious and inoperative. So is Sec. 2930.

Merchant appraisers are not only of a higher grade than the ordinary appraiser or assistant appraisers (who are appointed

by the President and confirmed by the Senate), but are of a higher grade than examiners, clerks, verifiers, samplers, messengers, or any other person employed in any of the departments of the appraiser's office. Such persons, however, have nevertheless been held to be of the grade of officers; and are in practice and by statute appointed by the Secretary of the Treasury. Thus the examiner in practice places his initials upon the invoice he examines, but his signature is no appraisal. He is a mere assistant to the assistant appraiser, whose signature when followed by the approval of the appraiser, is requisite to constitute the appraisement (Arts. 454, 455, Rec., fol. 32). Yet the examiner is the appointee of the head of a department, and so are clerks, verifiers, samplers, openers, packers, and even messengers. By Section 2940 U. S. R. S., the Secretary appoints such examiners as may in writing be determined by him "to be necessary to aid each of the assistant appraisers;" but no person shall be an examiner who is not "practically and thoroughly acquainted with the character, quality and value" of the article he is to appraise. Moreover, such person shall take the oath *of office;* and shall not "be employed in any commercial or mercantile business, or act as agent for any person engaged in such business;" and all provisions relating to the duties of appraisers or to any proceedings consequent or dependent upon the action of appraisers shall be construed to apply to them (see R. S., Sections 2941, 2942 and 2539).

These provisions are referred to as affording statutory illustrations of the grade, functions and sources of authority of employees whose compensation within certain limits is fixed by the Secretary of the Treasury, who appoints them. Such appointees are unquestionably "employed in the Civil Service of the United States," whether they are appointed for or paid by the day, the hour, the week or the month. The method of their stipend and the duration of their service are exclusively determined by the Secretary of the Treasury. In all of these respects except in respect to the source of their appointment and the dignity of their functions, these employees do not differ from merchant appraisers. Both belong to the class of officers or employees in the Civil Service.

For all purposes of the customs revenue in the administration of the statutes and regulations of the Treasury Department, all of these appointees enjoy the dignities and are subject to the obligations and penalties of officers of the customs revenue. Thus it has been held at Circuit that an examiner who knowingly aids in the appraisement of goods at less than their true value is liable to be convicted and punished under the section describing such offences when committed by any "officer of the Revenue," as provided by Section 5444 (U. S. *vs.* Thorne, before BENEDICT, *J.*, S. D. N. Y., not reported).

For the purposes of this discussion, the *grade* of a merchant appraiser as an officer is unimportant; his function and source of authority only are important. The measure and nature of his compensation are worthy of consideration only in connection

with the Civil Service Statute of 1883; and as illustrating that he was not the nominee of the importer or the selected arbitrator or Referee that formerly served under a similar appellation under the statutes as they existed half a century ago. These statutes are referred to elsewhere in this argument. It may be noted here, however, that (see Record, p. 40) the compensation of merchant appraiser was, by Article 472 of the Treasury Regulations, five dollars per diem, "to be paid by the party taking the appeal," such payment to be enforced by withholding delivery of the importer's merchandise. In support of this regulation the Treasury Department refers to U. S. R. S., Section 2725, by which "merchants who may be appointed to act as appraisers" under Section 2609, shall receive five dollars a day. Reference to Section 2609 shows that section to relate exclusively to the instances where merchant appraisers are appointed by the Collector at ports for which no appraiser is provided by law. There is no provision anywhere in the Revised Statutes for the compensation at any stipulated rate whatever, "to be paid by the party taking the appeal," to merchant appraisers who shall be appointed by the Collector, pursuant to Section 2930. This petty imposition which for many years has been practiced by the Government upon importers, by which, under stress of the Treasury Regulations, the Government escaped paying these illegally appointed appraisers, has at last been removed, as a result of a in the case of Iselin *vs.* Hedden, 28 Federal Reporter, , where it was held that there was no statute authorizing harge upon importers. This charge has now been dis- d; and under some authority of the Department not pub- the regular series of synoptical decisions, the merchant appraisers, it is understood, are paid by the Government at the rate of "not exceeding three dollars for every day" employed, if actually engaged, under Section 2733, providing for compensation at that rate for persons whom the "Collector may find it necessary and expedient" to employ in aid of the revenue.

This very payment of merchant appraisers under Sec. 2733, by virtue of which (fol. 72) inspectors of customs are regularly paid—persons whose character as officers of the customs has long since been established—shows not only that merchant appraisers are Government officers, but also that the fact of their being Government officers is now emphasized by the Government itself.

It could not with any propriety be said that an employee or officer appointed by virtue of the mandatory provisions of Section 2930 to perform statutory functions in the assessment of duties, was one of the employees or subordinates which a collector at his option might find it "necessary and expedient to employ" in aid of the revenue. The employment was not according to the Collector's choice and judgment touching its necessity or expediency, but by virtue of the mandate of the statute in Section 2930; the appointee's name only being subject to the determination of the Collector. This name might be that of one of

the four general appraisers, or of two merchants. Except in respect to merchant appraisers, the Collector in the whole statutory range of the customs service has no other authority to appoint. He may *nominate* to the head of a department, but it is the Secretary in all such cases who *appoints*.

In this connection it may be observed that the Collector, by virtue of his office, has no right to make an appraisement except in special cases, as where there is a disagreement between the two appraisers he shall have appointed under Section 2930. When he makes the appointment of "two discreet and experienced merchants" under Section 2930, those appointees exercise, respecting the invoices submitted to them, offices identical with the General Appraiser, who may and who may not act, instead of one of the merchants, as the option of the Collector may determine. It may be that in the Collector's judgment it is "impracticable" to associate, as a member of this appraisement board, one of the so-called "general appraisers" instead of one of the merchants. Of this emergency, the Collector seems to be the exclusi according to the statute. Now there are but four ge praisers for the whole country, and they are not local nor are they appointed to appraise specific cases. They missioned to be employed in visiting such ports as the S may deem useful for the security of the revenue, and ports afford aid and assistance in the appraisement of m dise as may be deemed necessary by the Secretary "t and insure uniformity in the collection of the revenue f toms." (R. S., Section 2608.) These officers are executive aids. They have no power to certify to any appraisement except as it is specially given them by virtue of a special designation by the Collector under Section 2930, when acting exclusively in association with a merchant appraiser appointed under that section; and then only in the specific cases referred to such officer. Such reference is supposed to proceed because of the peculiar knowledge and judgment such appointees may have attained as experts in the particular line of inquiry to be submitted (see Treasury Regulations, Articles 1407 and 474, Record, folios 41 and 60). The Collector must designate a general appraiser for each invoice, or else he must name two discreet and experienced merchants; or he may name two merchants, and to them send all the invoices of his port which are the subject of appeals. In the case at bar he did neither. A merchant appraiser's oath, the importer's appeal and the invoice were sent to a general appraiser (Brower), who, thereupon, with the merchant appraiser, proceeded to act. (See Rec., fols. 85, 76, 136.)

with the Civil Service Statute of 1883; and as illustrating that he was not the nominee of the importer or the selected arbitrator or Referee that formerly served under a similar appellation under the statutes as they existed half a century ago. These statutes are referred to elsewhere in this argument. It may be noted here, however, that (see Record, p. 40) the compensation of merchant appraiser was, by Article 472 of the Treasury Regulations, five dollars per diem, "to be paid by the party taking the appeal," such payment to be enforced by withholding delivery of the importer's merchandise. In support of this regulation the Treasury Department refers to U. S. R. S., Section 2725, by which "merchants who may be appointed to act as appraisers" under Section 2609, shall receive five dollars a day. Reference to Section 2609 shows that section to relate exclusively to the instances where merchant appraisers are appointed by the Collector at ports for which no appraiser is provided by law. There is no provision anywhere in the Revised Statutes for the compensation at any stipulated rate whatever, "to be paid by the party taking the appeal," to merchant appraisers who shall be appointed by the Collector, pursuant to Section 2930. This petty imposition which for many years has been practiced by the Government upon importers, by which, under stress of the Treasury Regulations, the Government escaped paying these illegally appointed merchant appraisers, has at last been removed, as a result of a decision in the case of Iselin *vs.* Hedden, 28 Federal Reporter, page 416, where it was held that there was no statute authorizing such a charge upon importers. This charge has now been discontinued; and under some authority of the Department not published in the regular series of synoptical decisions, the merchant appraisers, it is understood, are paid by the Government at the rate of "not exceeding three dollars for every day" employed, if actually engaged, under Section 2733, providing for compensation at that rate for persons whom the "Collector may find it necessary and expedient" to employ in aid of the revenue.

This very payment of merchant appraisers under Sec. 2733, by virtue of which (fol. 72) inspectors of customs are regularly paid—persons whose character as officers of the customs has long since been established—shows not only that merchant appraisers are Government officers, but also that the fact of their being Government officers is now emphasized by the Government itself.

It could not with any propriety be said that an employee or officer appointed by virtue of the mandatory provisions of Section 2930 to perform statutory functions in the assessment of duties, was one of the employees or subordinates which a collector at his option might find it "necessary and expedient to employ" in aid of the revenue. The employment was not according to the Collector's choice and judgment touching its necessity or expediency, but by virtue of the mandate of the statute in Section 2930; the appointee's name only being subject to the determination of the Collector. This name might be that of one of

the four general appraisers, or of two merchants. Except in respect to merchant appraisers, the Collector in the whole statutory range of the customs service has no other authority to appoint. He may *nominate* to the head of a department, but it is the Secretary in all such cases who *appoints*.

In this connection it may be observed that the Collector, by virtue of his office, has no right to make an appraisement except in special cases, as where there is a disagreement between the two appraisers he shall have appointed under Section 2930. When he makes the appointment of "two discreet and experienced merchants" under Section 2930, those appointees exercise, respecting the invoices submitted to them, offices identical with the General Appraiser, who may and who may not act, instead of one of the merchants, as the option of the Collector may determine. It may be that in the Collector's judgment it is "impracticable" to associate, as a member of this appraisement board, one of the so-called "general appraisers" instead of one of the merchants. Of this emergency, the Collector seems to be the exclusi according to the statute. Now there are but four ge praisers for the whole country, and they are not local nor are they appointed to appraise specific cases. They missioned to be employed in visiting such ports as the S may deem useful for the security of the revenue, and ports afford aid and assistance in the appraisement of m dise as may be deemed necessary by the Secretary "t and insure uniformity in the collection of the revenue f toms." (R. S., Section 2608.) These officers are executive aids. They have no power to certify to any appraisement except as it is specially given them by virtue of a special designation by the Collector under Section 2930, when acting exclusively in association with a merchant appraiser appointed under that section; and then only in the specific cases referred to such officer. Such reference is supposed to proceed because of the peculiar knowledge and judgment such appointees may have attained as experts in the particular line of inquiry to be submitted (see Treasury Regulations, Articles 1407 and 474, Record, folios 41 and 60). The Collector must designate a general appraiser for each invoice, or else he must name two discreet and experienced merchants; or he may name two merchants, and to them send all the invoices of his port which are the subject of appeals. In the case at bar he did neither. A merchant appraiser's oath, the importer's appeal and the invoice were sent to a general appraiser (Brower), who, thereupon, with the merchant appraiser, proceeded to act. (See Rec., fols. 85, 76, 136.)

with the Civil Service Statute of 1883; and as illustrating that he was not the nominee of the importer or the selected arbitrator or Referee that formerly served under a similar appellation under the statutes as they existed half a century ago. These statutes are referred to elsewhere in this argument. It may be noted here, however, that (see Record, p. 40) the compensation of merchant appraiser was, by Article 472 of the Treasury Regulations, five dollars per diem, "to be paid by the party taking the appeal," such payment to be enforced by withholding delivery of the importer's merchandise. In support of this regulation the Treasury Department refers to U. S. R. S., Section 2725, by which "merchants who may be appointed to act as appraisers" under Section 2609, shall receive five dollars a day. Reference to Section 2609 shows that section to relate exclusively to the instances where merchant appraisers are appointed by the Collector at ports for which no appraiser is provided by law. There is no provision anywhere in the Revised Statutes for the compensation at any stipulated rate whatever, "to be paid by the party taking the appeal," to merchant appraisers who shall be appointed by the Collector, pursuant to Section 2930. This petty imposition which for many years has been practiced by the Government upon importers, by which, under stress of the Treasury Regulations, the Government escaped paying these illegally appointed merchant appraisers, has at last been removed, as a result of a decision in the case of Iselin *vs.* Hedden, 28 Federal Reporter, page 416, where it was held that there was no statute authorizing such a charge upon importers. This charge has now been discontinued; and under some authority of the Department not published in the regular series of synoptical decisions, the merchant appraisers, it is understood, are paid by the Government at the rate of "not exceeding three dollars for every day" employed, if actually engaged, under Section 2733, providing for compensation at that rate for persons whom the "Collector may find it necessary and expedient" to employ in aid of the revenue.

this case and in

This very payment of merchant appraisers under Sec. 2733, by virtue of which (fol. 72) inspectors of customs are regularly paid—persons whose character as officers of the customs has long since been established—shows not only that merchant appraisers are Government officers, but also that the fact of their being Government officers is now emphasized by the Government itself.

It could not with any propriety be said that an employee or officer appointed by virtue of the mandatory provisions of Section 2930 to perform statutory functions in the assessment of duties, was one of the employees or subordinates which a collector at his option might find it "necessary and expedient to employ" in aid of the revenue. The employment was not according to the Collector's choice and judgment touching its necessity or expediency, but by virtue of the mandate of the statute in Section 2930; the appointee's name only being subject to the determination of the Collector. This name might be that of one of

the four general appraisers, or of two merchants. Except in respect to merchant appraisers, the Collector in the whole statutory range of the customs service has no other authority to appoint. He may *nominate* to the head of a department, but it is the Secretary in all such cases who *appoints*.

In this connection it may be observed that the Collector, by virtue of his office, has no right to make an appraisement except in special cases, as where there is a disagreement between the two appraisers he shall have appointed under Section 2930. When he makes the appointment of "two discreet and experienced merchants" under Section 2930, those appointees exercise, respecting the invoices submitted to them, offices identical with the General Appraiser, who may and who may not act, instead of one of the merchants, as the option of the Collector may determine. It may be that in the Collector's judgment it is "impracticable" to associate, as a member of this appraisement board, one of the so-called "general appraisers" instead of one of the merchants. Of this emergency, the Collector seems to be the exclusive judge according to the statute. Now there are but four general appraisers for the whole country, and they are not local officers, nor are they appointed to appraise specific cases. They are commissioned to be employed in visiting such ports as the Secretary may deem useful for the security of the revenue, and at such ports afford aid and assistance in the appraisement of merchandise as may be deemed necessary by the Secretary "to protect and insure uniformity in the collection of the revenue from customs." (R. S., Section 2608.) These officers are executive aids. They have no power to certify to any appraisement except as it is specially given them by virtue of a special designation by the Collector under Section 2930, when acting exclusively in association with a merchant appraiser appointed under that section; and then only in the specific cases referred to such officer. Such reference is supposed to proceed because of the peculiar knowledge and judgment such appointees may have attained as experts in the particular line of inquiry to be submitted (see Treasury Regulations, Articles 1407 and 474, Record, folios 41 and 60). The Collector must designate a general appraiser for each invoice, or else he must name two discreet and experienced merchants; or he may name two merchants, and to them send all the invoices of his port which are the subject of appeals. In the case at bar he did neither. A merchant appraiser's oath, the importer's appeal and the invoice were sent to a general appraiser (Brower), who, thereupon, with the merchant appraiser, proceeded to act. (See Rec., fols. 85, 76, 136.)

VI.

The Treasury Regulations, regardless of any statute upon which they may be founded, if not in contravention of positive law, suffice of themselves to constitute the merchant appraiser a dignified and superior officer.

Conceding that the Treasury Regulations are not *ultra vires*, they clothe the merchant appraiser with all the functions of an official character, and establish him beyond question as "an officer" of the customs revenues. The plaintiffs' invoice was therefore appraised by an illegal and unconstitutional Board of Appraisers.

For instance, in respect to the invoice before the "tribunal," there is no distinction in the *quantum* of authority between that exercised by the General Appraiser and his associate, the merchant appraiser. Both exert the same jurisdiction and powers, neither having any conclusive authority without the agreement of the other. In the event of a difference it is the certificate of that difference only that gives the collector a right to perform the duties of an appraiser, and that renders the conclusions that may be arrived at by either member of this board nugatory and worthless. Merchant appraisers, by Article 1416, Treasury Regulations, are expressly directed to be governed by its provisions; to *limit the hearing of the importer* to the statement of one person only in his behalf, to hear only concise *statements of facts* and *not to hear arguments*, and otherwise to pursue their inquiries "in such manner as *they* deem most conducive to a just and equitable determination of the question." They are to make a special report in writing (Article 1417). They shall closely inspect articles ordered for appraisement, and where they retain doubts submit samples with their opinions to Collectors for transmission to the Secretary (Article 1409). They must "rigidly" exclude unauthorized persons from the rooms where goods are awaiting or are under examination for reappraisement (Article 1410). They must "diligently examine and inspect such goods" as the Collector may direct (Article 1408). They must file in the Collector's office all testimony in writing, all depositions taken by virtue of their office (Article 479). And they must, "by all reasonable ways and means in his or their power proceed to ascertain, estimate and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise at the time of exportation, and at the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels or quantities, and such actual market value or wholesale price of every of them as the case may require" (Articles 475 and 477). They proceed "agreeably" to the statutes applicable to original appraisements (Sec. 2930). They are not to permit their proceedings to "assume the nature of a judicial inquiry where

judgment is rendered in accordance with the preponderance of testimony on either side" (?), but should proceed as experts "to ascertain whether the local appraiser has reported the true and proper market value of the merchandise in question" (Article 474, fol. 41). They receive from the Collector the invoice or invoices of the "merchandise to be examined and appraised"; whereupon they procure from the storekeeper or other officer having charge of them the samples or packages ordered for examination, and proceed "to examine and appraise in the manner pointed out by law"; "the valuation having been determined," they report the same to the Collector (folio 469). Having received in the first instance from the Collector their notice of appointment in the form prescribed by regulation (Article 467, folio 38) *they take the oath of office* prescribed by Article 468. It is supposed that before they begin their operations the Collector has called upon the local appraiser to inform him, "whether additional samples or packages" of the goods are necessary to secure full compliance with the law, and the subordinate officer sends more or less samples according to his will. (Article 464.) They may summon witnesses and administer oaths and take depositions in writing which shall be "preserved for future use or reference and transmitted to the Secretary of the Treasury." (Article 459.) They must make their examination of the articles at the public store and before they shall have been delivered to the importer, unless special permission in exceptional and specific cases shall otherwise be granted. (Articles 447 to 451.) They may also procure the redelivery to them of further packages, if necessary in their judgment. (Article 452.)

"The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question (suppose he is not?) and it is presumed that the general appraiser will have, or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his *official duty* with a due regard for the rights of all parties, and *independently of the testimony of interested* witnesses" (Fol. 65). Why should an officer have the right to take testimony and be instructed to act independently of their testimony?

"The functions of the reappraising board are the same as those of the original appraisers. They are themselves to appraise the goods and not to depend for their information upon the appraisement of so called experts in the line of the goods in question." The reappraisement proceeding is not "in the nature of a trial in a court of law wherein the reappraising officers sit as judges and render decisions according to the preponderance of testimony adduced." (See Record, p. 29.)

These quotations from the order of the Secretary of the Treasury themselves establish, in connection with the regulations above quoted, the dignity and public functions of this high office. He is repeatedly ordered to *obey the Secretary*, and under the statutes and regulations must necessarily obey him, unless it may be in the execution of some plainly unlawful direction. The

Secretary directs him in acting with the general appraiser to "reappraise the merchandise in substantially the same manner as is pursued on original appraisement" (Record, page 30), and to summon and examine witnesses on oath, "touching anything which they may deem material" in the performance of their office. In the same breath they are instructed that "there is no authority for the public examination of such witnesses, or their cross-examination by importers or counsel employed by such importers" (Record, fol. 67).

Here is an *officer*, call him ministerial or *quasi* judicial as you please, having pretended authority to take testimony in private and without opportunity for cross-examination! It is difficult to assign a tribunal of this authority to any one of the three departments recognized by the United States Constitution. If this authority be a lawful one surely it establishes an "executive office" that "is essentially executive." Statements of merchants and others "shall be taken in the presence of official persons only." No representative of an importer shall be present, except "his employee or salesman; there is no office here for the lawyer." The merchant appraiser takes the sworn statement and compels it. Is he not an "official"? Persons "not officially called before the appraisers" are to be excluded. These merchant appraisers, as well as all other appraising officers, are to act officially under the Secretary's directions "to the end that the tariff laws may be strictly enforced." These quotations are from Secretary's order (Record, pages 29, 30, 31). While they may adopt any reasonable and proper means of ascertaining the value as *they* think proper (although the statutes fix the methods)," unless on the face of the appraisement corruption or irregularity appears, their findings cannot be questioned. The law constitutes them the tribunal for this specific purpose and their valuation must be their own impartial judgment"; which upon being certified is a finalty and with it "neither the President nor any head of a department nor the Courts can interfere so long as the forms of law are followed." * * * (See Treasury order, No. 7800, of October 8, 1886.) These Treasury instructions have secured the weight of some judicial authority, except where they contemplate the examination of witnesses exclusively in the absence of the party interested, or after the exclusion of his counsel. Even those exceptions, however (which are disregarded in practice), are valueless if the fairness and reasonableness of the proceedings of the Board may not be the subject of judicial scrutiny, as under the rule applied in this case they could not be.

Upon the foregoing it is clear that by all the definitions and institutions of OFFICE, the performance of a merchant appraiser's functions under the Treasury Regulations constitute him an officer, and establish his return, report, certificate—whatever it may be termed—as the only warrant upon which duties could be lawfully exacted in cases upon which he acted.

Until the merchant appraiser made his decision the Collector had no power to exact the duty. Upon the invoice described in the appraiser's return, preceded by the appraiser's oath of office and the Collector's appointment, the functions of the merchant appraiser's office were exercised.

Whether the effect of exercising that function has been to exempt the citizen from a tax to which he would otherwise be lawfully subject, or to *impose a tax or penalty which this merchant appraiser's signature gives the Government the right to demand*, need not be considered at this point. It is sufficient that *the public nature of his duties* are prescribed and the special authority designated which furnishes the exclusive warrant by which he performs them. *This nature and authority* establish the *office*. If established outside of constitutional provisions the office itself is nugatory and with it falls all that is dependent upon it.

VII.

This Court has established these MERCHANT APPRAISERS *as* CUSTOMS OFFICERS, *and has so described them respecting the official exercise of their extensive and exclusive powers.*

An exposition of their OFFICE is found in *Hilton vs. Merritt*, 110 *U. S.*, 97, where their determinations are repeatedly spoken of as the valuations of "customs officers."

In that case the defendant had officially expressed his surprise that three "discreet" merchants had differed in their conclusions from the general appraiser; nevertheless, the Court excluded testimony as to what was the record of the proceedings of these appraisers; and as to whether their conclusions corresponded with the evidence before them or with the essential requirement of the statutes. The Court held that such evidence "tended only to show carelessness or irregularity in the discharge of their duties by the *customs officers*, but not that they were assuming powers not conferred on them by statute," and that such issues were "immaterial and irrelevant," that "Congress had said that the valuations of the *customs officers* shall be final;" and if their proceedings are open to review "we must strike from the statute the clause which renders the valuation of dutiable merchandise final." In at least seven different instances are these merchant appraisers characterized in this opinion as customs "officers." The unconstitutionality of their appointment was not presented or considered.

It is there said that the apparent intent of the Legislation was to exclude any other method of ascertaining the dutiable value of imported goods except by the conclusions of these "officers," who constitute a "special tribunal," whose judgments are "final," and whose proceedings shall not be exposed

in evidence. Justly or iniquitously, by erroneously applying the complicated legal rules for ascertaining dutiable value, or by vicious caprice, the fiat of these extraordinary officials impose penal duties that in their nature imply perjury in the importer's oath on entry. Their signature becomes the warrant for exactions far in excess, it may be, of any possible value of the thing assessed; equivalent sometimes to confiscation.

Their assessment establishes a debt for which *indebitatus assumpsit* will lie in favor of the Government; for it has been repeatedly held that the obligation of the importer to pay the duties regularly assessed on his importation may be enforced in a personal action.

VIII.

While it is believed that Congress never really designed to withdraw the proceedings of these appraisers from the constitutional scrutiny of the judiciary, it is nevertheless no longer open to question that by statutory interpretation, Department regulation and judicial determination of the highest authority, these appraisers have become essential factors in the present scheme of revenue administration, and "CUSTOMS OFFICERS" *of power and authority "inferior" to none in the United States Revenue system. Their powers are now exercised by Presidential appointees, holding a life tenure of office.*

The statute (Sec. 2930) necessitates their official review of the action of officers appointed by the President and confirmed by the Senate. They are "superior," not "inferior," to officers so appointed. It is respectfully submitted that it is not within either the spirit or the letter of the Constitution that such a *superior* officer should be selected by an authority "*inferior*" to the constitutional source of authority which commissions the officials, whose determinations are thus to be reviewed.

In any meritorious constitutional sense, the "special tribunal" of review should be commissioned at least by as high authority as the "inferior" officers, whose acts are thus revised. The "superior" officers comprising this "special tribunal" are not, it is submitted, even "inferior officers," who may be appointed by heads of departments or courts of law, much less by the Collector of a port. It is not within the constitutional power for Congress to bestow on collectors the power to appoint any officer whose determinations constitute an assessment of duty.

Yet this appointee, this "special tribunal," these merchant appraisers, have in fact no other function except to make assessments of duty, and that function is exercised exclusively when revising assessments made by other officers. Great powers are vested in them for that purpose, for the exercise of

which they alone are responsible. Their responsibility is to no constitutional source.

Are their offices ministerial or judicial? Are they umpires, arbitrators or executive agents?

It is unimportant how they may be designated. "Officers" they are in *any* aspect.

Arbitrators they cannot be; for that office implies a consent to submit to the arbitrator.

The importer has no voice in this statutory and enforced "submission." In the case at bar he specifically objected.

It has been repeatedly declared that there was no other method whereby the importer might test the merits of an appraiser's acts in assessing for *ad valorem* duty except to file notice of dissatisfaction therewith, and thereupon the Collector proceeds under Sec. 2930 The importer submits nothing; and has no umpire, arbitrator or Referee. He is wronged, and is dissatisfied. He hopes his expressed dissatisfaction may bring relief; but otherwise if the Government contention is correct the importer is barred from the Courts by the "final and conclusive" edict of the Collector's "special tribunal."

This doctrine would dignify these high officers with an irresponsibility greater than that of any other Federal official. No official is above the law.

It requires no argument to sustain the proposition that if the merchant appraiser's determinations are conclusive unless absolutely void, then he must be commissioned by the constitutional source of all official authority.

Official acts are void if performed absolutely without power, jurisdiction or authority.

They are voidable only if having jurisdiction, the official act is in excess of the authority under which it is performed; or if having power it is exerted otherwise than in conformity with the law. Thus an officer may have power to assess a tax according to weight; yet he may assess the tax for twice the prescribed weight and his proceeding not be void, but voidable only, and subject to the correction of his irregularities as the proofs in a proper proceeding may demonstrate.

Whatever was the character of the merchant appraiser's position in the past under statutes now abrogated, for the present generation, and under the present law he is nothing more or less than a Government officer, and is so esteemed and acknowledged in practice.

The constitution of the Board of Reappraisers has gradually and steadily changed, but always to the Government's advantage. The board belongs to its creator and ruler; it is the Government board.

Having none of the elements of a reference, or an arbitration, or a court, or of a commercial performance, constituted as it is without the knowledge (fol. 102) or participation of the importer, proceeding as it does to examine and sample in the enforced absence of the importer (Rec., p. 28, Art. 1410, p. 59),

taking sworn evidence of competent and incompetent witnesses, while the importer is excluded and not permitted to cross examine, this "special tribunal" has become a foil to conceal official motives, to fortify incapable subordinates, and to masquerade in "*quasi* judicial" attitudes as novel as they are imperious.

It used to be said in favor of the old Board of Reappraisers that they were a tribunal constituted in part upon the importers' selection; and that their conclusions had somewhat the force of a statutory award. Now, every element of consent, submission, has passed away; and the "special tribunal" is nothing unless clothed, as has been recently assumed, with power to conceal "the particular facts and circumstances connected with their findings," and the conclusions upon which their judgments are found, and with authority to "adopt *any* reasonable and proper means," legal or not, to arrive at a judgment with which "neither the President nor any head of a department, nor the Courts can interfere so long as the *forms* of law are followed!" This quotation is from the Secretary's order S. S. 7800 of Oct. 8, 1886.

IX.

The merchant appraiser being an officer or employee in the customs service is amenable to the Civil Service law.

[redacted] is "not employed merely as laborer or workman," and [redacted]re falls within "Civil Service classification" of the [redacted]ry Department, at $5 per day (Art. 472, fol. 98) or even [redacted]er day (less than some customs inspectors per diem, and [redacted]me within the classification). The merchant appraisers' [redacted]oyment" is to be measured by that classification reproat Record, p. 17. He may be placed indifferently in class [redacted]s 1, 2 or 3. It is the same for the purpose of this case.

The statute reads (Ch. 27, Act Jan. 16th, 1883):

"SECTION 6. That within sixty days after the passage of this act, it shall be the duty of the Secretary of the Treasury * * * to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be altogether as many as fifty, and thereafter, from time to time, on the direction of the President, said secretary shall make the like classification or arrangement of clerks or persons so employed, in connection with any said office or offices in any other customs district. And upon like request, and for the purposes of this act, said secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents or persons employed under his department in any said district not now classified; and every such arrange-

ment and classification, upon being made, shall be reported to the President. * * *

"SECTION 7. That after the expiration of six months from the passage of this act, no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing or that may be arranged hereunder, pursuant to said rules, until he has passed an examination or is shown to be specially exempted from said examination in conformity herewith."

Then follow exceptions applicable to discharged soldiers, sailors, judicial officers, laborers, etc., not required to be classified (22 U. S. Stat. L., p. 405).

It thus appears that the statute prohibits the appointment of any *officer or other person employed* by the collector who comes within the established classification, except when such appointee shall have passed an examination or be shown to be specially exempted therefrom according to law.

The official classification pursuant to this section was offered in evidence (see Rec., p. 52) together with the proof that being in force at the time and place of the appointment, this merchant appraiser was not examined or appointed pursuant to that statute.

If the collector, prior to 1883, had the *absolute* right of appointment, the prohibitory terms of this later act against Civil Service appointments except as there prescribed, is controlling.

If the merchant appraiser be an employee as distinguished from an officer, only "discreet and experienced merchants" who have retired from business may be so employed, because under Sec. 2941, R. S., such employees shall not be engaged in any commercial business. In this case the merchant appraiser was a merchant. (Rec. fol. 89.)

X.

The section (2930) *is* WHOLLY *inoperative,* BECAUSE *of its unconstitutional features.*

In Allen *vs.* Louisiana, 103 U. S. R., 83, it is said:

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected; but (2 Gray, 84) 'if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.' The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature."

taking sworn evidence of competent and incompetent witnesses, while the importer is excluded and not permitted to cross examine, this "special tribunal" has become a foil to conceal official motives, to fortify incapable subordinates, and to masquerade in "*quasi* judicial" attitudes as novel as they are imperious.

It used to be said in favor of the old Board of Reappraisers that they were a tribunal constituted in part upon the importers' selection; and that their conclusions had somewhat the force of a statutory award. Now, every element of consent, submission, has passed away; and the "special tribunal" is nothing unless clothed, as has been recently assumed, with power to conceal "the particular facts and circumstances connected with their findings," and the conclusions upon which their judgments are found, and with authority to "adopt *any* reasonable and proper means," legal or not, to arrive at a judgment with which "neither the President nor any head of a department, nor the Courts can interfere so long as the *forms* of law are followed!" This quotation is from the Secretary's order S. S. 7800 of Oct. 8, 1886.

IX.

The merchant appraiser being an officer or employee in the customs service is amenable to the Civil Service law.

He is "not employed merely as laborer or workman," and therefore falls within "Civil Service classification" of the Treasury Department, at $5 per day (Art. 472, fol. 96) or even at $3 per day (less than some customs inspectors per diem, and who come within the classification). The merchant appraisers' "employment" is to be measured by that classification reproduced at Record, p. 17. He may be placed indifferently in class A, class 1, 2 or 3. It is the same for the purpose of this case.

The statute reads (Ch. 27, Act Jan. 16th, 1883):

"SECTION 6. That within sixty days after the passage of this act, it shall be the duty of the Secretary of the Treasury * * * to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be altogether as many as fifty, and thereafter, from time to time, on the direction of the President, said secretary shall make the like classification or arrangement of clerks or persons so employed, in connection with any said office or offices in any other customs district. And upon like request, and for the purposes of this act, said secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents or persons employed under his department in any said district not now classified; and every such arrange-

ment and classification, upon being made, shall be reported to the President. * * *

"SECTION 7. That after the expiration of six months from the passage of this act, no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing or that may be arranged hereunder, pursuant to said rules, until he has passed an examination or is shown to be specially exempted from said examination in conformity herewith."

Then follow exceptions applicable to discharged soldiers, sailors, judicial officers, laborers, etc., not required to be classified (22 U. S. Stat. L., p. 405).

It thus appears that the statute prohibits the appointment of any *officer or other person employed* by the collector who comes within the established classification, except when such appointee shall have passed an examination or be shown to be specially exempted therefrom according to law.

The official classification pursuant to this section was offered in evidence (see Rec., p. 52) together with the proof that being in force at the time and place of the appointment, this merchant appraiser was not examined or appointed pursuant to that statute.

If the collector, prior to 1883, had the *absolute* right of appointment, the prohibitory terms of this later act against Civil Service appointments except as there prescribed, is controlling.

If the merchant appraiser be an employee as distinguished from an officer, only "discreet and experienced merchants" who have retired from business may be so employed, because under Sec. 2941, R. S., such employees shall not be engaged in any commercial business. In this case the merchant appraiser was a merchant. (Rec. fol. 87.)

X.

The section (2930) *is* WHOLLY *inoperative,* BECAUSE *of its unconstitutional features.*

In Allen *vs.* Louisiana, 103 U. S. R., 83, it is said:

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected; but (2 Gray, 84) 'if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.' The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature."

In Trade-Mark Cases, 100 U. S., 98, it is said, beginning with a quotation from WAITE, *C. J.*: "'We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of these sections must stand as a whole or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. * * * To limit this statute in the manner now asked would be to make a new law, not to enforce an old one. This is no part of our duty.'

If we should in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

Thus plaintiffs in error insist in this case that it is not within the judicial province to give to the words in Section 2930 a narrower meaning than they are manifestly intended to bear. The appointment and office of the merchant appraiser, under Section 2930, is the essence and validity of the section. It is not within the judicial province to eliminate from the statute the office as here established and provided for. Such elimination is a destruction of the section.

In 114 U. S., 304, Virginia Coupon Cases, it is said: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctively separable that each can stand alone, and when the Court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact. An illustration of this principle is found in Trade-Mark Cases, 100 U. S., 82, where an Act of Congress which was claimed would have been valid as a regulation of commerce with foreign nations and among the States was held to be void altogether because it embraced all commerce, including that between the citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which *was* subject to the control of Congress. If we should in the case before us undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

The plaintiffs in error insist that it is not within the judicial province to disintegrate Section 2930 so that the substance of its board of review shall remain for importers who may be dissatisfied with the appraisement otherwise provided for by Chapter VI. of Title 34. The section must be absolutely eliminated from the statutes. Any construction which must be strained or forced upon Section 2930 with a view to give it some practical

operation disassociated from the appointment and action of the merchant appraisers as therein specified, would unquestionably "confer upon the statute a positive operation beyond the legislative intent—beyond what any one would say the Legislature would have enacted in view of the illegality" (quoted from the principle as followed and stated in Spraigue *vs.* Thompson, 118 U. S., p. 95). If the unconstitutionality of the institution of merchant appraisers appointed by the Collector, had been brought to the attention of the Legislature, the result undoubtedly would have been a change from the present reading of the section. But who would undertake to forecaste that change?

In Peo. *v.* Com'r of Taxes, 94 U. S., p. 418, a proviso or qualification of a system was declared unlawful and void and "necessarily fell with it." This Court said: "When the main idea was thrown out of existence the subordinate parts which were adjuncts of and dependent upon the main theory ceased to exist."

XI.

Merchant appraisers' acts are voidable if irregular if the "special tribunal" does not act strictly within its explicit scope of authority. If it disregards any statute, its proceedings are open to judicial investigation and action.

Any other view would negative the requirements of law, and constitute the executive official his own judge as to whether his acts were lawful or unlawful. It would remove his determinations from the cognizance of the courts, and institute a novel standard of official performances. It would arrogate to the executive the power of interpreting laws, and annihilate the salutary power of the judiciary to enforce executive accountability. Such a suggestion is alien to the spirit and genius of our jurisprudence. Duties are to be assessed by "uniform laws." Taxes are imposed by Congress as the result of the operations of law, not of the immeasurable and infallible performances of revenue officials. Individual property is protected by fixed rules prescribed by the law of the land, and is not enjoyed at the discretionary forbearance of any official or tribunal. On the other hand the Government revenues are not dependent on the caprices of special officers, but on the uniform application of Congressional standards to specified objects according to prescribed methods incorporated in the law of the land. In the operation of that law each department of the Government—the legislative, executive and judicial—performs its proper function; and it is not within the power of the Legislature to withdraw from the judiciary the exercise of that function to hear and determine in a proper case brought according to the course of the common law, the legality or illegality of an executive performance in alleged disregard of private rights under the law.

Hence the exceptions to the rejection of evidence are well taken as stated in the 1, 2, 3, 8, 10 and 11th specifications of error.

XII.

It should not be necessary to argue that while Congress possesses power to lay and collect imposts, it is not constitutionally competent for Congress to depute that power to one or many executive officers. Having described by statute the "uniform" duties it designs to impose, Congress, it is true, may, within certain limitations, prescribe the means by which imposts shall be collected. If those means, however, extend so far beyond the scope of ministerial action as in effect to exert directly the power of taxation to the point even of absolute confiscation, it may well be questioned whether Congress is not unwarrantedly imposing on the executive department tasks which constitutionally are the exclusive prerogative of the Legislature.

"The power to tax is the power to destroy." Such a power should not be exercised dogmatically, capriciously, inscrutably, by executive mandate.

This departure from Congressional prerogative should not lightly be presumed.

While, therefore, resisting its constitutional possibility, plaintiffs in error respectfully insist that neither the Revised Statutes themselves, nor any controlling interpretation of them warrant the proposition that Congress, instead of its own standards, intended that appraisements representing official caprice should measure the amount of revenue.

If the naked fact that a formal appraisement has been made constitutes the irremediable amount of revenue collectible or payable on that importation, then it would have been quite unnecessary for Congress to have exercised itself (as it often has) as to whether the standard of *ad valorem* duties should be the home market or the foreign market, the place of production or the place of shipment; or as to whether the duties should be reckoned on the "net prime cost," or on one stated percentage above the actual cost if imported from the Cape of Good Hope, and on another stated percentage if imported from elsewhere.

If official appraisements irrevocably measured the amounts of the revenue, it was idle for Congress to struggle as it did in the effort at one time to collect and at another time to relinquish duties on various commissions and charges, which sometimes were and sometimes were not to be included in the *ad valorem* standard. The official appraisers had but to certify a result, no matter what items they considered, and duties were leviable accordingly.

Had Congress intended that this certificate should be accorded so potential a dignity, it would not from time to time have changed its *ad valorem* standards; *e. g.*, from actual cost to market value; from value in place of production to value at place of exportation; from value at time of purchase to value at the period of exportation; from a wholesale price including commissions to one excluding commissions; from a value including trade-marks to one regardless of trade-marks; from a wholesale

"market value in the principal markets of the country" of exportation, where it is supposed there exists such markets for the article in question, to the cost of manufacture, where it is supposed such markets do not exist.

Surely, since 1789 successive Congresses would not have struggled over legislation upon these details, had the judgment of the executive as to what should be the *amount* of duties been designed to afford the final measure of the revenue.

The proposition is too startling to be accredited. It is true that there are some judicial expressions affording color to the suggestion that these executive appraisements preclude investigation as to whether the appraisement was according to the Congressional standard or by some other standard, or by no standard at all, or by erroneous comparisons, or according to domestic instead of foreign values; yet such expressions will only be found in exceptional cases arising under legislative conditions totally inapplicable to the case at bar, and readily distinguished from it.

Besides the more recent expressions of the Supreme Court in the cases of Morill vs. Jones, 106 U. S., p. 466; and of Oberteuffer vs. Robertson, 116 U. S., p. 499; Oelbermann v. Col. and Mustin v. Cadwalader, Robertson v. Frank, &c., *supra*, uphold the right of the judiciary to scrutinize "in a proper case" all the details upon which depend any Congressional impost; while these decisions likewise denote the application of the judicial arm to restrain executive action within the limits prescribed by the Legislature.

XIII.

The foregoing views as to the intent and operation of existing statutes are fortified by a brief statement of the origin, purposes and scope of appraisements, and their historical relation to the *ad valorem* system.

Ad valorem duties at first (1789) were estimated upon "the actual cost" of the merchandise plus twenty per cent. thereon if imported from beyond Cape of Good Hope, and otherwise ten per cent. exclusive of all charges (Sec. 17, Ch. V., Laws 1789). Non-enumerated articles paid five per cent. on their value at the time and place of *importation* (Sec. 1, Ch. II., Laws 1789). All this was determined by the importer's oath on entry giving "an account of the net prime cost" (Sec. 13, Ch. V., *Ib.*). It was only damaged goods, or goods unaccompanied by an invoice that were the subject of an appraisment; and the appraisement was only for "estimation" of duties (Sec. 16, Ch. V., *Ib.*); or if invoiced and fraud was suspected by the collector, he selected one and the importer selected another "reputable merchant" to make the valuation for the duties to "be first paid or secured to be paid," as required in other cases of importation (*Ib.*, Sec. 22).

Substantially the same provisions were re-enacted with more

liberal options reserved in provisos for the importer in the obsolete Act of 1790 (Ch. 35, Laws 1790, Secs. 37, 39, 46).

In 1795 (obsolete Ch. 17, Sec. 3) *ad valorem* duties were to be estimated "upon the actual cost at the place of *exportation*, including all charges" (commissions, outside packages and insurance only excepted).

In 1799 (Ch. 22, Sec. 61) Congress returned to values at "place of IMPORTATION," according to the method previously prescribed in Sec. 13, Ch. V., Laws 1789, and Sec. 39, Ch. 35, Laws 1790; while the scope and limitations of appraisements was continued (*Ib.*, Sec. 52) with some elaboration as to details substantially as denoted by the Act of 1790. There was only one form of entry, and the oath of the importer set forth the *cost* upon which duties were assessed, unless at the importer's request sea-damage had occurred to the goods, or in the unavoidable absence of his invoice he nevertheless wished to complete his imperfect importation entry. In such instances the goods themselves, in their original packages were, by the collector, taken to a warehouse and there detained until the dutiable figures had been ascertained, "either by the exhibition of the original invoice * * * or by appraisement at the option of the owner," who designated his own appraiser.

The executive act provided for by Congress was to ascertain the actual *cost*, and to this cost a fixed percentage was to be added, depending upon the place of exportation, and subject to discriminating duties if the importation came in national or certain foreign ships.

Congress so rigidly fixed the standards and rules by which *ad valorem* duties should be levied that there was no latitude for the discretion of appraisers, except where the importer sought permissive favor in avoidance of the regular statutory requirements.

The Congressional standard was again declared in 1816 (Ch. 107, Sec. 1, par. 5, 3 St., 311) that in all cases where an *ad valorem* duty shall be charged it shall be calculated on the *net* cost of the article at the place *whence imported* (exclusive of packages, commissions and all charges), with the usual additions established by law "of 20% for importations from beyond the Cape of Good Hope," etc., etc., etc.

In 1817 a supplementary act similarly defined the home standard of *net cost* for "all cases where an *ad valorem* duty shall be charged" (3 Stat., 369); and in 1818 (3 Stat., 434) repeated it, but excepted commissions, etc.

It was the *cost* also, excluding or including certain additions, upon which *ad valorem* duties were to be charged under the Act of 1823 (Ch. 21, 3 Stat., 730), with certain rare exceptions as mentioned in prior acts, and where the value in the country of *production* was a necessary incident in arriving at the actual cost (*Ib.*, Sec. 5).

Under this act (1823) it was obvious that *appraisements* might become of enlarged importance, and careful provisions respecting them were made which have long since disappeared from the statutes.

Thus: Section 16 provided for the appointment of two appraisers in each of certain ports; but for other ports as occasion might require, its Collector should appoint "two respectable merchants."* By its Section 18, where the importer was dissatified with the primary appraisement, *he might employ at his own expense* "two respectable resident merchants" who, together with the two appraisers "appointed on the part of the United States under this Act," examined and inspected the goods and reported their value if they agreed, and if not "the circumstances of their disagreement." If the importer was dissatisfied with the report, the case might be referred to the Secretary of the Treasury who was "authorized and empowered to decide thereon, or to require further testimony in the case, in such manner as he may deem proper, and to order the goods to be entered accordingly."

This power is no longer reposed in the Secretary, but is vested in the Collector's unqualified or capricious, but unassailable appointees under Sec. 2930 R. S.

There was nothing in the Act of 1823 about the conclusiveness of appraisements; although evidence could not be admitted on the part of the United States in any Court "except in corroboration of such entry." No case is found in the Reports impugning the decision of the Secretary under this Act. It is mentioned as exhibiting the origin of the "special tribunal" provided for by R. S., Sec. 2930. In composition and power, however, the two boards may be contrasted, not compared.

Upon the slender fabric of this scheme of arbitration over a comparatively simple, single fact, has grown the claim of executive domination over the Congressional standard of *ad valorem* duty.

The standards may be more embarrassing and difficult than they were at first; but the standards exist, and the *power* of the judiciary to secure their fixity and to ensure their application in a proper case may not constitutionally be circumscribed.

Prior to 1828 *cost* at home or abroad, with or without various additions thereto as Congress vacillated, had in the absence of fraud been the standard for the assessment of duty. In 1828 (Ch. 55) the new standard was established of "*actual value at the time purchased and place*" of *exportation*, which was "in all cases" of goods subject to *ad valorem* duties, to be appraised "by all the reasonable ways and means" in the power of the appraisers and "of every other person who shall act as such appraiser" (4 Stat., 273, Sec. 8).

The methods of estimating such value for dutiable purposes was thereafter the subject of constantly varying legislation. Both in respect to specially described merchandise and in general application will Congressional standards be found in 1832 (4 Stat., 583, Sec. 2; *Ib.*, 591, Sec. 7; *Ib.* 593, Secs. 13, 15); in 1842 (5 Stat., 548–9, Ch. 270, Secs. 1, 2), "when

* No controversies under this section have been found in the reports. So far as the section is found incorporated in the Revised Statutes (Sec. 2609) it would, in view of its correlative sections, be held to be unconstitutional for the reasons previously stated.

the principal markets of the country" of exportation were fixed as the *place* of valuation (*Ib.* 563, Sec. 16); in 1846 (9 Stat., 43, Ch. 74, Sec. 8); in 1851 (9 Stat., 629, Ch. 38, Sec. 1), when the term "wholesale price" was introduced as an alternative with "market value" and the time and place of *exportation* substituted for time of *purchase* and place of *production* in ascertaining value. Language was then (1851) used showing (as this Court said in 18 How., 525) "that Congress had changed its policy in this respect and intended to repeal" the laws inconsistent with it. Subsequent legislation touching this standard will be found in 1861 (12 Stat., 197, Ch. 68, Secs. 28, 32) and in 1864 discriminating between dutiable value and market value (13 Stat., 216, Secs. 23, 24); in 1865 (13 Stat., 493, Sec. 7, repealing last-cited sections); in 1866 (14 Stat., 330, Sec. 9) where the substance of Sections 2907, 2908 R. S., is enacted; in 1873 (17 Stat. 559, Sec. 4); in 1874 (18 Stat., 188, Sec. 14); in 1883 (22 Stat., 523, Secs. 9, 7, 8).

Why should Congress have so exercised itself as to prescribed standards if appraisers may apply their unrestricted and conclusive judgment?

Reference to the appraisement acts succeeding 1828 will also show it was never so intended.

In 1830 (4 Stat., 409, Ch. 147), when an appraiser, additional to the Act of 1799, was authorized for New York, it was made the appraiser's duty to revise the appraisement of his assistant and report to the collector who, if he deemed any appraisement too low, might order a re-appraisement, either by the principal appraiser or by "three merchant appraisers" designated by the collector, who should cause the duties to be collected accordingly. Afterwards, if the importer swore that the appraisement was too *high* and *gave his statutory reasons*, then he should designate one merchant and the collector another, who, if they disagreed, should "designate an *umpire*, and when they or a majority of them shall have agreed shall report to the collector; and if *their appraisements* shall not agree with that of the United States appraiser the collector shall decide between them (Sec. 3). It was under the liberal scheme of *arbitration* provided for by this act that the case arose of Rankin *vs.* Hoyt, 3 How., 335, when this Court commented on the arbitration opportunity which the importer in that case had failed to availed himself of as one for a "further hearing before another tribunal constituted in part by persons of his own selection," to which, if he did not resort, he could not complain. In that connection the arbitrators were alluded to as "legislative referees," to whom the importer is bound to resort before complaining of illegal exactions.

This meritorious scheme of *arbitration* before arbitrators chosen by the parties disappeared from the statutes in 1842, after which period (5 Stat., 563, Ch. 270, Sec. 17) dissatisfied importers were relegated to a reappraisement by "two discreet and experienced mercnants" whom the *collector shall select.* These appointees were subject to all the laws and regulations applicable to "other officers of the customs" (Sec. 24).

Whatever may have been the virtue of prior enactments, this

Act of 1842 hardened as it is by the Act of 1851 (9 Stat., 630), which in turn has become incorporated into Section 2930, is a vicious intrusion upon the constitutional source of the power of appointment. But even under the Act of 1842 no reported case has been found where the judiciary refused to look behind the certifications of these collectors' appointees.

When for this harsh enactment of 1842 the Act of 1851 Ch. 38, became substituted, by which one of four "general appraisers" might be chosen by the collector in lieu of one of the "*merchant*" appraisers, the singular and questionable phrase was appended to Section 3, whereby in the event of the members of this "special tribunal" disagreeing the collector shall decide between them, and the "appraisement thus determined shall be final and deemed and taken to be the true value of the goods, and duties shall be levied accordingly, *any act of Congress to the contrary notwithstanding*" (9 Stat., 630). Thus at one stroke the carefully devised standards of appraisements prescribed by previous statutes were swept away, and the "appraisement thus determined" by this unconstitutional tribunal attempted to be substituted.

Fortunately the words last italicised are omitted in the Revised Statutes at Section 2930, where the third section of this Act of 1851 is restated; so that the existing enactments of Congress prescribing the current standards of dutiable value remained unimpaired and found appropriate place in the various sections of the Revised Statutes, applicable to those topics. These sections have been already quoted in this argument.

They furnish in exhaustive detail not only the substance and method of procedure, but the standards by which lawful results shall be attained. Thus an importation from China is not to be measured by the value of the same goods in Paris; nor an importation from Berlin in 1886 by the value of the same goods in Algeria in 1816. Besides, many of the various requirements of statute have received judicial construction, and officers may not disregard the law or substitute for it their private judgment.

Appraisements must, therefore, be in all respects lawful in substance and in form. The statute must be deemed to speak of *lawful* appraisements as "final;" and the "duties shall be levied" accordingly.

The reasonable meaning of this language is that there shall then be an end of appraising.*

---

*This construction has been judicially assigned to a corresponding statute recently before the United States Circuit Court for the District of Oregon. Under an Act of July 5, 1884 (23 U. S. Statutes, 118) the Commissioner of the Bureau of Navigation was charged with the supervision of the laws relating to the admeasurement of vessels, etc., etc., etc., and on all questions of "interpretations growing out of the execution of the laws relating to these subjects and relating to the collection of tonnage tax and to the refund of such tax when collected erroneously or illegally, *his decision shall be final.*"

Respecting this statute the Court said:

"At first blush it may appear that this provision in the Act of 1884 repealed so much of Sections 2931, 3011, Rev. St., as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the Department.

But, on reflection, I am satisfied that the word 'final' is used in this connection with reference to the Department, of which the Commissioner is generally a subordinate part.

In my judgment, the purpose of the provision is to relieve the Head of the Department

Duties "shall be levied," is a constantly recurring phrase in our revenue laws. It has never been construed to foreclose judicial cognizance. The successive schedules of our tariffs have generally been introduced by the phrase that duties "shall be levied, collected and paid," etc., etc., etc. (Section 2503).

Upon the appraisement the collector must proceed to levy the duties. If upon judicial scrutiny it appears the *appraisement* is unlawful, the Courts declare it void. This is the irrevocable prerogative of the judiciary. Any intrusion upon this power should be declared in explicit and unmistakable terms, which the Revised Statutes do not attempt.

On the contrary, Congress is careful to reserve unimpaired, full scope for exercise of the judicial power in all cases where "judicial remedy already existed in the nature of an action at law * * * triable by jury" (Sections 3011, 2931, 2932). The limitations as to time, appealing beforehand to the highest revenue official (Secy. of Treas'y), furnish no intrusion upon this remedy, except as any government may impose statutes of limitation and protection to its officers. Nor do such prerequisites furnish the grounds of the action. They afford the conditions only under which the Government permits its officers to be sued. When these conditions, however, have been complied with, the Government officer who has been made the defendant, stands before the judicial eye, subject to the same scrutiny and liabilities to the plaintiff as any other defendant. If this were not so, it would be idle to bring him under the judicial cognizance. The statutes are then to be judicially applied to the pertinent facts of the case. In this exertion of judicial power Congress has no part. It may, within certain limitations, denote methods of procedure, but it cannot direct the judicial power as to its conclusions, or restrict its investigation of any fact essential to a conclusion of the issue in the case.

Any interpretation of Section 2930 leading to such a result should not be lightly arrived at; but should be resisted for one in harmony with the Constitution and genius of our institutions, particularly when adequate meaning is at the same time given to all the terms used in the statutes.

It is respectfully insisted that Section 2930, fairly construed as part of a system of laws denoted in its accompanying chapters

---

from the labor of reviewing the action of the Commissioner in these matters, to side-track into the Bureau of Navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the exaction of the same by Collectors.

The appeal is still taken to the Secretary of the Treasury, as provided in Section 2931, but goes to the Commissioner for decision, whose action is 'final' in the Department; as it would not be but for this provision of the statute.

This being so, and nothing appearing to the contrary, it follows that *the right of action given to the unsuccessful appellant in such cases is not taken away.*

The appeal to the Department has simply been decided by the Commissioner, rather than the Secretary, and, that having been adverse to the plaintiff, his right of action against the Collector attaches at once." *Laidlaw* vs. *Abraham*, 43 *Fed. Rep.*, 299.

When therefore Congress declared in Section 2930 that the merchant appraisement shall be final "and the duties shall be levied" accordingly, it would seem to declare the assessment at an end, so far as the accounting officers of the revenue were concerned; and to leave the Judiciary Department free to scrutinize that assessment in a proper proceeding, and to determine whether the assessment was laid in accordance with the statutes.

in the Revised Statutes, has no relation to and imposes no limitation upon the judicial department of the Government, its rights, duties and prerogatives. Moreover, to give it significance as against the judiciary, would accord to it an unconstitutional operation; and such construction is necessarily to be avoided. If this avoidance be deemed impossible, then the section is not in that respect constitutional. The distinctions between the legislative, judicial and executive departments are not to be heedlessly obliterated.

Here it may be justly interpolated that unless the merchant appraiser be an exalted "customs officer" of distinguished power, this contention of his subjection to judicial investigation is as uncalled for as it is unnecessary. But the exceptional authority claimed for him as an outlaw from judicial scrutiny and an autocrat independent of the laws of Congress, makes it expedient to curb his dominion within constitutional restrictions, while his OFFICE is exhibited in all its dignities. The greater the power, the greater the office. As its advocates extol this *office* they demonstrate its *incumbent* to be *an officer*. Thus again does Section 2930 infringe on the U. S. Constitution (Art. 2, Sec. 2). And, if the merchant appraiser can in any view escape his official character, then, of course, must his conclusions escape official sancity, and become like the doings of more modest and humble persons subject to the judicial scrutiny.

If the members of this "special tribunal" are "officers," the section falls. However these merchant appraisers may be regarded, their acts are open to the judicial scrutiny.

As was aptly observed by Mr. Justice MILLER, in the Centennial oration at Philadelphia, under the Constitution "no man is so high as to be above the law—no officer of the Government may disregard it with impunity."

Shall appraisers disregard with impunity every provision of the law enacted for their guidance in arriving at dutiable value?

XIV.

The harmonious construction of Section 2930, here contended for, is further fortified by the phrases found in Ch. 193, Act of June 22, 1874, known as the Anti-Moiety Law, where liquidation of duties shall in one year "*in the* absence of protest * * * be *final and conclusive* upon all parties"; implying as in the Revised Statutes, that payment under protest is *not* "final and conclusive" (Sec. 21). So certain *appraisements* specified in Section 14 shall "*in the absence of protest* be conclusive." The uniform assumption is obvious that in the mind of Congress there was nothing "conclusive" in the *presence* of protest and seasonable suits at law (18 Stats. 186, Secs. 21–14 and 26).

Indeed, disregarding (as we should not) the application of R. S., Secs. 3011, 2931 and 2932 to the preceding sections there is, nevertheless, this subsequent affirmative enactment of 1874 (Sec. 14) recognizing the inconclusiveness of appraisements and

the want of finality in the market value thus arrived at in certain cases where protest has been filed. This Court, in 6 Otto, 146, Arthur *vs.* Goddard, also recognized this in a case where the dutiable value certified by the appraiser, was successfully questioned; and again in Oberteuffer *vs.* Robertson, in a case where "in form the appraiser added the items," held to be no part of the duitable value.

Enquiry into the legality of the items of an appraisement, or in what manner—lawful or unlawful—the certified dutiable value arrived at would have been impossible under the terms expressed at the circuit in the case at bar. If the ruling below is correct it is within the irremediable power of the appraisers so to certify their results as to abrogate any or every provision of law as to how they shall be attained, or what they shall include or exclude.

Such a proposition is refuted by its own statement.

XV.

Actions at law of this character, founded on the illegality of the transaction, existed at common law prior to the Constitution; and are therefore guaranteed under the Seventh Amendment, which preserves the right of trial by jury in all "suits at common law where the value in controversy shall exceed twenty dollars."

Lord Mansfield (K. B., 1774) sustained the right of action against a customs officer of the crown for alleged illegal duties. The duties had not been paid over to the crown by the officer who collected them, and he was made the defendant for the purpose of trying the right to impose such duties, precisely as U. S. Collectors are by statute permitted to be made defendants even after paying the moneys into the public treasury, provided statutory notices of protest are given them.

The crown officer had exacted 4½% tax on certain Grenada sugar exports under authority of certain letters patent of the King dated in 1764, and subsequent proceedings thereunder. The plaintiffs claimed that in 1763 the King had by his proclamation commissioned the Governor to call an assembly to enact laws under which the colonial assembly only should impose such duties, unless Parliament itself should impose them; and that as the tax in question was unwarranted either by such assembly or by Parliament, the exaction was unlawful, and was recoverable at common law.

This view of the law being sustained, the plaintiff recovered.

Hall vs. *Campbell, Cowper*, 205.

See also: *Stevenson* v. *Mortimer*, 2 *Cowp.*, 805; *Champlin* v. *Bullman, Parker's Rep.*, 198; *Snowdon* v. *Davis*, 1 *Taunt.*, 359; *Irving* v. *Wilson*, 4 *Term. R.*, 485; *Buller* v. *Harrison, Cowp.*, 565; *Elliott* v. *Swartwout*, 10 *Peters*, 157; and this

common law has prevailed in State Courts in actions against United States officials. *Ripley* v. *Gelston*, 9 *Johns.*, 201; *Clinton* v. *Strong*, *Ib.*, 370.

The common law right to sue a collector and to test the legality of his exactions in a common law action has never been held to have been impaired, except by the collector's statutory obligation to pay his collections daily into the treasury, and not to withhold them because of notices disputing their legality. When such notices, however, are given, the Government expressly consents that the collector shall be amenable in a proper case to the judicial power. The right to sue accorded under certain preliminary statutory limitations, creates the status of consent on the part of the Government, that the defendant for all purposes of the suit may be regarded as retaining the money in his hands after due protest.

He is the recipient of the plaintiff's money, paid to him under coercion. The plaintiff seeks to prove the payment under restraint—the illegality of the transaction, or the mistake of fact or of law, as the case may be; and the judicial power determines whether the exaction was the result of compliance with all the conditions necessary to warrant the assessment, or whether the plaintiff is right in contesting it.

Congress has expressly reserved to the Courts the exercise of this judicial power, which, indeed, could not constitutionally be withheld. In the exercise of this power the Courts proceed according to the course of the common law, to determine the issues as if between individual parties to the suit. That is, they proceed according to "due process of law," which generally implies regular allegations, an opportunity to answer, and a trial according to an established course of judicial procedure. It is not the *title* to the merchandise that is in question in such an action of assumpsit; it is the *legality* of the transaction.

That Congress may prescribe summary methods by which executive officers may dispose of imported merchandise for revenue purposes, and convey a good *title* to merchandise so disposed of, need not be questioned. Such a case was substantially presented here in Irving's Lessee *vs.* H. L. & I. Co., 18 How., 274, where the Court held that the title conveyed under a summary distress warrant against a public debtor (Collector Swartwout) was in accord with a practice from very ancient times, and no intrusion on the Constitution as against due process of law.

If such a warrant, however, was illegally issued or called for the payment of unwarrantable sums, and such moneys were paid under coercion to procure property about to be sold under it, is there any doubt that the *officer* executing the warrant and coercing the payment would, after due notice and tender, be amenable to the judicial department in a suit at law; or that in such case, his warrant would be subject to the ordinary judicial tests and exemptions?

The case of Irving's lessee affected only the *title* to specific property, and has no relation to the rights of a plaintiff in an action of assumpsit against a Government officer whom the Government consents may be sued for his acts. The same observa-

tion also applies to the case of Springer *vs.* U. S., 102 U. S. R., 594, which concerned the *title* of the *res*, and not the *topic* under consideration here.

Prior to the Revised Statutes and after the consent given by the Government in Sec. 14, of the Act of June 30, 1864 (13 Stat., 214), no case had imposed limitations upon the legitimate exercise of judicial power in these actions of assumpsit against the collectors. The express consent of the Government in Secs. 3011, 2931, 2932, R. S., confirmed in Secs. 14, 21, 26, Act of June 22, 1874, that notwithstanding defendant's daily payments into the Treasury, he is amenable to an action in the nature of an action at law triable by jury, not only waives the privilege of exemption from suit which belongs to a sovereign, but necessarily relegates to the Courts the *legality* of the proceedings on which the payment in question was based, and imposes on the judicial department the exposition in a proper suit of *every essential fact* on which such legality depends. "*Exactions of whatever character*" are defined (Sec. 2932) as subjected to the judicial cognizance.

XVI.

Conclusion.

It is submitted that the appraisers did not proceed by "all reasonable ways and means"; that whether they did so or not is, in the case at bar, a mixed question of law and of fact to be submitted, therefore, to the jury; that the unlawfulness of the appraisers' procedure is amenable to judicial correction in a proper suit at law, like the present one; that there is no statute declaring any appraiser's conclusions final, except the reviewing appraisers or reappraisers provided for by U. S. R. S., Sec. 2930; that that section is void for material unconstitutionality, in that such reappraisers are necessarily OFFICERS whose appointment is not constitutionally provided for; that any disregard of law in the process of the assessment of duty is open to judicial scrutiny; and that actions for that purpose existed by the common law in England prior to the United States Constitution, were preserved to the people of New York after the Revolution, were recognized under the New York Constitution of 1777, and perpetually guaranteed by the Seventh Amendment to the United States Constitution.

There was therefore error in not receiving the evidence offered below, and in not submitting to the jury that which was received; and in the other respects upon which error is assigned; so that the judgment should be reversed and a *venire de novo* issued.

Dated Washington, October, 1890.

HENRY EDWIN TREMAIN,
MASON W. TYLER,
ALEXANDER P. KETCHUM,
Of Counsel for Plaintiffs in Error.

APPENDIX.

The order of the Treasury Department recited at Record, p. 29, is alluded to in the special report to the Speaker of the House of Representatives by the Secretary of the Treasury (Mr. Manning), under date of December 7, 1885, accompanying the annual report of that date.

After instancing some of the difficulties experienced in administering the appraisement statutes then in force, and specifying certain alleged "irregularities and improper practices" which it was supposed had grown up at New York, he says that they resulted:

"in an unseemly scuffle between importers and appraising officers, Special Agents of the Treasury, and local officers at New York. The law, and the General Regulations of the Treasury, are clear and adequate.

It seems to me, after a careful examination of the reports, that nearly every question presented had been disposed of by my predecessors, from time to time, during the last forty years, and the decisions published. I issued, however, on June 9, 1885, new instructions (p. 98), which accompany this report. After they had been published, elaborate written arguments were presented to me by legal counsel of importers who thought themselves aggrieved by my instructions. Therein it was asked:

(1.) That the importer be permitted to be present at the re-appraisement; which permission had never been denied so far as I am aware.

(2.) That the importer be permitted to support his own oath on entry, and, within proper limits, to confront any opposing witness by testimony.

(3.) That he be permitted at the reappraisement to test the evidence offered to impeach the correctness of the value stated by him on the entry.

(4.) That he be permitted to be represented by a lawyer, and to cross-examine witnesses.

To the arguments, and the reference to judicial authority, offered to sustain the contention of the importers, I gave careful attention, and took the opinion of competent experts in my Department, and at several of the ports, the result of which was to confirm the correctness of my instructions of June 10, 1885 (see Rec., p. 31). To those instructions I shall adhere until otherwise directed by competent legal authority.

It would be impracticable for the Executive to carry on reappraisements of the value of imported merchandise by the forms and methods of 'a lawsuit,' as those forms and methods are employed in judicial proceedings. In what relates to the commercial designation of imported articles, their classification for duty, and the rates of duties to be levied thereon, the importer has ample recourse to the judicial tribunals, but the ascertainment of dutiable values has, by the law, been wisely made purely an executive function, involving, it is true, the exercise of discretion and judgment, but not on that account a judicial function in the sense in which the Federal Constitution has distributed powers among Executive, Legislative, and Judicial Departments.

To aid the Collector in selecting "a discreet and experienced merchant" the Treasury regulations require the appraiser to submit to the Collector the names of suitable persons, but it appears, from the reports made to me, that this important work was by the appraiser delegated to an examiner, and that the Collector, instead of himself exercising his most important function, was in the habit of committing it to a Deputy, in palpable disregard of the obligations of official duty.

A wrangle took place at the port of New York as to whether the 'discreet and experienced merchant' must be an importer, or could be a jobber of merchandise similar to that under investigation. It was even seriously contended by importers, and apparently conceded by some local officers of the customs at

New York, that it would not be possible to find in New York a 'discreet and experienced merchant' competent to appraise a certain class of merchandise brought into that port and sold, in great quantities. The immediate predecessor of the present Collector, on instructions from this Department, took the selection of a merchant appraiser into his own hands.

In a system of AD VALOREM rates there are two critical points: One is dutiable value, and the other is rate of duty. The present rate of duty on certain silk goods is fifty (50) per cent. of the market value at the time of exportation in the principal markets in the country, or what is equivalent to one-half of the importation. If the law were so administered by the Treasury Department that on the importation of one importer fifty (50) per cent. was levied, and on the importation of another importer forty (40) per cent., and on that of another importer thirty (30) per cent., there would be a general outcry. So there would be if an importer at New York was required to pay only thirty (30) per cent., and if of another at Buffalo was demanded forty (40) per cent., and of another at Chicago was required fifty (50) per cent. But a none the less illegal and intolerable result would follow if the dutiable value on one importation were fixed at one hundred dollars ($100), on another, by the same vessel, at eighty dollars ($80), and on another by the same vessel at sixty dollars ($60). the merchandise in all the three being similar. If importers can illegally control dutiable values, they can control the amount of duties paid on the merchandise, although the AD VALOREM rate may be fixed and uniform for everybody and every port in the country."

With like force it may be said that if unregulated valuations, insured against judicial inspection, can be controlled by irresponsible Treasury appointees, then these subordinates, and not Congress, actually "*control the amount* of duties paid on the merchandise, although the *ad valorem rate* may be fixed and uniform for everybody and every port in the country."

FILED
NOV 13 1890
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 78.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, AND ADOLPH WILLIAM VON KESSLER, PLAINTIFFS IN ERROR,

against

EDWARD L. HEDDEN, COLLECTOR, DEFENDANT IN ERROR.

BRIEF IN REPLY FOR PLAINTIFFS IN ERROR.

H. E. TREMAIN,
MASON W. TYLER,
A. P. KETCHUM,
Of Counsel for Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 78.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, AND ADOLPH WILLIAM VON KESSLER, PLAINTIFFS IN ERROR,

against

EDWARD L. HEDDEN, COLLECTOR, DEFENDANT IN ERROR.

Brief in Reply for Plaintiffs in Error.

On reading the brief of the defendant in error some considerations present themselves as worthy of observation by way of reply.

I.

The Government point VIII argues that the office of "merchant appraiser" as instituted by United States Revised Statutes, section 2930, establishes only an agency or employé "working for the Government and paid by it, as

nine-tenths of the persons rendering service to the Government undoubtedly are, without thereby becoming officers," and that Congress is not excluded from providing "necessary assistants, agents, commissioners, or experts in any proper case."

The argument then proceeds thus:

"The position and action of the merchant appraiser in the machinery for the collection of duties is well understood."

(*a.*) "Primarily it is for the collector to estimate the amount of dues payable upon imported merchandise and to receive the duties, and the merchant appraiser is, when the proper case arises, his helper, his expert, assistant, and executive agent in ascertaining value under the statutes."

(*b.*) "The collector needs to know immediately, in order to complete his duty in relation to certain imports then on view, their actual wholesale market value at the time and in the principal markets of a country specified."

(*c.*) "It is not in human nature that one man can decide correctly as to the value of many of the numberless articles imported. Information must be obtained of their value. In one contingency the expert to furnish the information in a practical way has been the merchant appraiser." * * *

(*d.*) "The valuation is but one element of the obtaining of revenue from imports. This appraiser, *so far as his work goes, is the representative of the collector.* The appointment comes from, the oath is taken before, and the report runs to the collector whose further action continues therefrom." * *

(*e.*) "When thus selected this appraiser is notified of his appointment and of the time and place of the re-examination (Rec., p. 16); he takes an oath to perform this specific appraisal (pp. 16, 71); he is paid per day for his services whether employed in one case or many (pp. 18, 51.)" * * *

(*f.*) "A man may be called upon to act only once in a lifetime. The statute does not use the word "appoint." The position is without tenure duration continuing, emolument, or continuous duties; it is at most occasional and temporary. Such a position is not an office, and such an *assistant* is not an officer under the requirements of the clause of the Constitution under consideration."

(*a.*) The proposition that "the merchant appraiser is" in any case under section 2930 the collector's "helper, his expert assistant, and executive agent" is as novel as it is inaccurate. Primarily—that is to say, on the original entry—it is *not* for the collector to make any estimate of valuation whatever. It is true he makes an estimation of the amount of duties; but that estimation under the statutes, so far as valuations are concerned, is based exclusively upon the importers' oaths the invoice, the entry, and the certificates accompanying the original papers. Upon these valuations the classification and other factors of duty are then estimated. The collector is not clothed by statute or by any regulations with any right whatever to change valuations when entries are originally presented to him for estimations. He must, before exercising any judgment upon valuations, cause the invoice to be appraised. In respect to the valuations to be reached upon appraisement the *office* of the appraiser is exercised, and not the office of the collector. *The appraiser under*

the statutes is not the collector's representative or his assistant. He is a distinctive official and an individual officer whose duties are regulated by law and whose office is filled by the President and Senate. In reaching his official conclusion the appraiser is in no aspect the subordinateof the collector, but, on the contrary, the appraiser is absolutely independent of the collector's control.

(*b.*) "In order to complete his duty in relation to certain imports then on view" the collector need not know, and, indeed, is under no official obligation to learn at once the actual market value of invoices when originally presented to him for entry. True, he may seize if he suspects fraud. That, however, is not the function of estimating the duty. The collector's estimation of duty is originally made upon the oath of the importer on entry touching valuations.

(*c.*) It is precisely because "it is not in human nature that one man can decide correctly as to the valuation" that the statutes exclude that function from the collector's official duty, and establish at the large ports a bureau or department for appraisements or assessments as distinguished from a bureau for collections. Under section 2930 there is only one contingency when the collector may exercise his official judgment upon the topic of valuation; and that is when two members of the re-appraising board certify to him their individual disagreement. In that case only—that is, after the Government has exhausted all the resources of the appraiser's department—does the collector become an appraiser, and then his decision is declared to be "final and conclusive" for the purposes of levying and collecting the duties. Even then the collector acts only as an

appellate court upon the record and argument submitted by the disagreeing officers.

(*d.*) While it is quite true that "the valuation is but one element for obtaining of revenue from importers," it is beyond contradiction that a separate set of officials whose acts are specifically regulated by distinctive enactments are established for the express purpose of arriving at valuations by appraisement. The proposition, therefore, that so far as the work of an appraiser goes the appraiser "is the representative of the collector" is respectfully challenged. True, papers are transmitted under the law to appraisers, and appraisers make their returns thereupon to the collector. But appraisers make the assessments, so far as they depend upon valuations, and collectors are not permitted to reduce or to enlarge the valuations upon which such assessments depend.

There is no instance contemplated by the statutes where the collector may reduce the valuation certified by an appraiser, and there is no instance where he may enlarge it without the certificate of an appraisement. In every case his valuation of duty must be based absolutely upon an appraisement.

As far as the collector's official acts are concerned, he is absolutely bound by the valuations certified to him by the tribunal of the two appraisers organized under U. S. R. S., 2930. Even should the collector think an original appraisement too low to protect the Government, he is without power in the premises except to order a new appraisement, by the results of which he must likewise be bound. His own judgment in respect to valuations is not permitted to be exercised, and is without warrant of the statute except in the one instance of a divided board.

(*e.*) When, therefore, the Government brief argues that the appraiser receives a notification "of his appointment" and "takes an oath" to perform his specified duty "and is paid per day for his services, whether employed in one case or many," it would seem that there was no room left to contest his official character.

(*f.*) Is it essential that a statute should use the word "appoint" to render it invidious when establishing an office which the Constitution declares shall be filled only from the constitutional sources of appointment? Certainly the use of the word "select" instead of "appoint" does not evade the Constitution, nor does it avoid the Constitution by establishing an office without attaching to it tenure, duration, continuing emolument, or continuous duties. Moreover, the Treasury regulations acknowledge the selection to be an appointment, as it is (Rec., p. 37, act 467). An office may be as well occasional or temporary as permanent Under this obnoxious statute the office of merchant appraiser may be either temporary or permanent. It may be constant for all the importations of one importer, or of one line of importations, or of one port, or for all the importations of one day, one month, or one year.

The collector's official relation to such an appointee ceases when he has placed in his possession the invoices upon which the appointee is to act. The collector fills the office and then sends business to it and causes his appointee to be paid while occupied. If Congress can confer upon the collector a power of this character, then there is no function under the revenue laws which may not constitutionally be lodged with local subordinates, chosen day by day by local

officials, to certify what revenue the Treasury may receive, what revenue a collector may exact, and what tax the citizen must pay.

The persons to whom the revenues of the Government may thus be farmed, or the privileges of fixing, in special cases, the amount of the Federal revenue, have only to be *called* "*assistants*," and the constitutional provisions are fulfilled!

In speaking of these merchant appraisers under the act in question, this Court, in Bartlett *vs.* Kane, 16 Howard, p. 263, said:

"The appraisers are appointed '*with powers by all reasonable ways and means to ascertain, estimate, and appraise the true and actual value and wholesale price*' of the importation. The exercise of these powers involve knowledge, judgment, and discretion; and in the event that the result should prove unsatisfactory a mode of correction is provided by the act. It is a general principle that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter. The only questions which can arise between an individual claiming a right under the acts done and the public or any person denying their validity are power in the officer and fraud in the party; all other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law." (P. 272.)

The Attorney General, in the argument of the above case

(p. 267), declared that the ascertainment of the actual market value or wholesale price plainly made "the ascertainment of that fact an executive function; an administrative, not a judicial process. The particular executive and administrative jurisdiction and process are carefully specified in the law in a manner to exclude all other jurisdictions and to make the ascertainment of the fact by that particular jurisdiction final and conclusive." Now, if this description be correct, the OFFICE of merchant appraiser needs no elevation, and must of course be without constitutionality.

If this proposition needed further fortification it is supplied by the dignities, functions, and potentialities claimed for the OFFICE of merchant appraiser in the first seven points of the Government brief.

II.

An obvious misapprehension has doubtless occasioned the expression in the Government brief to the effect that special importance has been attached since this trial to the statutory requirement of appraising "by all reasonable ways and means;" on the contrary, it will be seen by the bill of exceptions that one of the principal features attending the trial of this case was the plaintiff's claim that under the orders of the Treasury Department in force at the time of the importation in question and pursuant to which this appraisement was necessarily made it was impossible that there should be a reappraisement by "all reasonable ways and means." The statute declaring "all reasonable ways and means" an essential characteristic has not been complied with and, indeed, could not be complied with under the Treasury orders of June 9th and 10th, 1885 (Record,

pages 29 to 32). These orders show that the appraisement in question was practically made upon the report of the so-called expert* (Schmid), and that instead of the reappraisers exercising their independent judgment by reasonable methods, a scheme was devised and was officially imposed upon them to appraise in accordance with the reports of the Government's agents. It is incorrect to state (see Government brief, point 6) that no claim is made that the report of Schmid was incorrect; on the contrary, the whole case has arisen because of the appraisement according to the "report of Schmid" instead of according to an appraisement by "all reasonable ways and means."

It was insisted below and is urged here that under those instructions which appraisers were not at liberty to disregard and which to appraisers had the force of law until they should be condemned by some competent court no appraisement "by all reasonable ways and means" was [illegible]. Hence the court was asked to submit these orders, together with what limited evidence out of that proffered which the Court had received, to the jury to find whether there had been any lawful appraisement, and that the Court would tell the jury what constituted a lawful appraisement.

*If it be of consequence to observe it, the arithmetic of the appraisement demonstrates the efficient operation of the Treasury order of June 10, 1885, directing appraisers "in no case to appraise" below the cost (Rec., p. 71) reported by the experts (fol. 70–117). Thus the experts' report was (fol. 119) to add 722.25 francs to the invoice, so as to make the "cost" 6,971.75. To this "cost" a profit of about eight per cent. was necessarily added for manufacturer's profit, which it was stated (Rec., fol. 117) was not included. Then 6,971.75 francs plus eight per cent. thereon (557.74) results in 7,529.49 francs, which is, in substance (7,510.10), the actual appraisement (upon the assumption that charges are disregarded).

(See Rec., pp. 154, 155, and 13th and 15th assignments of error.)

The allegations of the protest (Rec., pp. 39, 40, 41) were upon trial. These included that the reappraising officers did not proceed according to law (p. 40), "and said merchandise was not reappraised by reasonable ways and means or by any lawful board" or "in any lawful way;" that "witnesses were privately examined;" that plaintiffs were not permitted to confront opposing witnesses or to examine or cross-examine any witnesses or to have the benefit of counsel; that the witnesses privately called in by the board "testified to values other and less than the figures designated by said board, which were unsustained by any competent evidence whatever adduced before said board" (*Ib.*, p. 40), and that the reappraisement was conducted upon information and advice not communicated to the importers and on evidence unknown to them which they were afforded no opportunity to controvert" (*Ib.*, p. 41), and that the pretended appraisement was unlawfully made "under the suggestion, direction, and undue influence of the Secretary of the Treasury," and instead of being the appraisers, independent judgment "was the record of the determination of some other officer or person (Rec., pp. 58, 59) who was without authority to appraise the said merchandise." (Rec., p. 39.)

The contention was and is that if these allegations be well founded the statute directing the appraisement to proceed "by all reasonable ways and means" has been nullified, and the appraisement consequently unlawful; but much of the material evidence on this subject was excluded under exceptions assigned (8, 9, 10, 11) for error. (See Rec., pp. 57, 58, 59, etc.)

Nor can plaintiffs in error acquiesce in the inference drawn by the court below from what little testimony was admitted. The restatement of some of these inferences in point III of the Government brief may be recited. Thus it is said: "Merchant Appraiser McCreery had samples of plaintiff's goods;" whereas Mr. Robinson's testifies that while "some samples" (fol. 104) were there he did not "know that the samples that Mr. McCreery had were samples from the particular cases 172, 173, and 174" (the cases under advisement). (See Rec., fol. 109.)

The Government say: "They were not excluded from their goods;" whereas the witness explains the operation of the invidious orders, and declares (p. 109) that "he could not get into that other room, where the *goods* were, when he was not called as a witness on other people's cases," unless he went in by some favor. "He was not allowed there when the witnesses were examining the goods. The watchman will put you out if you go in." The witnesses "were not in the room at the time" (fol. 106) he was called in before the board. The statement of the learned judge below, at folio 151, is cautious, but misleading in view of this testimony.

Nor is it quite accurate for the Government to argue that "no objection of any kind was made," in the light of the successive protests made in all the ways directed by the statutes and applicable to every step of the protested assessment, and under a condition of affairs which simply called in for not "more than five minutes" the importer's agent to tell the board what he had done, and to remain ignorant of what the board had already done.

Boards, however constituted, which are clothed with power over public and individual rights, whose decisions

create debts, surely do not, under the methods described by orders and evidence in this record, proceed by "reasonable ways and means;" but if these described and ordered methods be deemed in any aspect "reasonable," then their certified results attain an official dignity that requires the signature of a constitutional officer. The incumbent of such an office is none the less an officer because called by some other name.

As is well stated in point VI of the Government brief, "the first appraisal was superseded in every respect by the second, and the second was final." Thus it is clear that if the first appraisal was an official act, so was the second appraisal, and the person lawfully appointed to certify thereto is an officer. He is, indeed, the *superior* officer, whose certificate vacates, modifies, or affirms the first appraisement, and without his signature no valid assessment can be made in any case upon which he has been called and is sworn to act. As well argue that a referee is not an officer of the court as that an appraiser is not an officer of the revenue.

III.

The suggestions immediately preceding point I of the Government brief, that there is "no color of claim" that plaintiffs "paid any duty upon charges," as denoted in plaintiffs' main brief, pages 2 and 4, coupled with the argument in point VII of the Government brief that the element of error in the case cited arose "outside of the valuation itself" and outside of the appraisement, is based on a misapprehension of fact. The statement as made in our main brief is maintained, that "if the importers' claim be correct, they have really paid duty on the charges and on 167.80 francs"

besides, because the total valuation as claimed by the importers is 440.10 francs less than the valuation upon which they have been made to pay duty.

If the importers' valuation be the true one, then duty on charges has been exacted under some other name. It is impossible to ascertain whether duty has been paid upon charges or not until the true valuation is ascertained. The claim, therefore, is made in this case that there exists the right to disintegrate the appraisement, and so to ascertain *how much of the valuation* upon which the duty is exacted *is the true dutiable value* and *how much* was the *undutiable charges.* In other words, can duty on charges be exacted under another name or under the pretext of adding to make market value? In truth, this was what was done after this Court and Congress had declared charges not to be dutiable.

IV.

At point 4 of the Government brief it is suggested that plaintiffs proposed on the trial to show that the merchant appraiser's mind was simultaneously acting between several appraisements. This is a misapprehension. The exceptions referred to at pages 45 and 46 of the Record arose because the plaintiffs wished to denote in full what the record in other places circumstantially establishes, that the merchant appraiser, Mr. McCreery, was in fact acting under such a general appointment from the collector as to enable him to continue his official functions indefinitely, and in many cases besides the case at bar.

V.

The argument *ab inconveniente* frequently appealed to in the Government brief would result in refusing to the judiciary its powers of scrutiny over the executive department. Then there would be no method of determining how far the laws were obeyed. Administration would become a matter of official volition and enactments of Congress a futile amusement. If it be true, as argued in point IX of the Government brief, that because Congress has power to lay and collect duties and to "make all laws which shall be necessary and proper" for that purpose, irrespective of any other provisions in the Constitution, then Congress and not the judiciary may at once become the judge of the Constitution itself.

The doctrine appealed to in the Government brief, based upon the assumed prerogatives essential for any government in the protection of its revenue and in the conduct of its executive public business and in the administration of its laws, is a doctrine which, if applied to the extent claimed, would necessarily result in transforming a republican government and other governments limited by constitutions into despotisms.

The central idea of a constitutional government is that all its departments and all its officers are amenable to law.

VI.

The proposition at the head of point X of the Government brief, that legislation, official practice, and long public acquiescence have established the Government position in this

case, is respectfully challenged—*first*, because it furnishes in this court no answer to the contentions here of the plaintiffs in error, and, *secondly*, because it is not warranted historically.

As was aptly expressed by a predecessor of our learned opponents, "It more concerns us to ascertain what is the constitutional rule than to learn whether that rule has always been observed. Nineteen violations of the Constitution do not justify a twentieth." (13th Opinions of Attorney General, 518.)

The attempt to justify the appointment by the collector of a merchant appraiser by reference to a series of statutes relating to the selection of merchant appraisers in earlier times for limited specified purposes under other statutory conditions must fail when the statutes are thoroughly examined. It is submitted that plaintiffs' point thirteen contains a fair and accurate historical digest of these statutes and their relation to each other on this topic. We do not acquiesce in the coloring given to them by the imperfect abstracts of some of the statutes attempted in the Government's point ten.

To illustrate: Under the act of 1789 merchant appraisers did not determine "valuations," as claimed in the Government point ten. It was the actual cost which furnished the dutiable standard, and this cost was proved by the importer himself when he had an invoice. When the collector suspected fraud and the goods were sea-damaged or the importer was without an invoice "reputable merchants" were called in to aid the collector, but they determined nothing. It was the collector who still estimated and determined what the merchandise had actually cost. The collector estimated

the duties upon his own judgment and the statute simply provided auxiliary methods to aid him in arriving at his conclusions.

It is therefore misleading to claim at the outset of Government's point ten that the merchant appraiser's office, as it existed under the Revised Statutes, was established in 1789 or in 1799. Appraisements for several decades were exceptional and only for the purpose of arriving at actual cost. (See plaintiffs' main brief, page 54.)

When later in our history appraisements became more important merchant appraisers were established as arbitrators, but without ultimate powers, and they were selected by the importer and *distinctly represented him* and not the Government. Besides, the Secretary of the Treasury was still the ultimate arbiter, and the determinations of this arbitration board necessarily depended for their finality upon their acceptability to the importer or the conclusion of the Secretary. (Plaintiffs' brief, page 55.) By successive degrees the merchant appraiser, from an advisory arbitrator selected by the importer to represent his interests in the verification of his own statement as to what the merchandise did actually cost, became transformed into a powerful official to certify to divers wholesale market values in a foreign county. This is a determination of an antecedent fact occurring abroad under unknown conditions which is in its nature incapable of ascertainment except upon evidence, and upon this evidence the incumbent of the merchant appraiser's station records his independent and unreviewable conclusions.

As an arbitrator upon home values or net cost on arrival of merchandise in this country, the "reputable merchant," appraising, was comparatively unimportant, and he acted

for the importer rather than for the Government. As the Government's representative—a judge (now appointed for life)—he became (like the new appointees substituted in his stead) solely a revenue officer in terms subjected to Treasury customs regulations, and was armed with the vast powers given to the class of officers to which he belonged, and was charged with the grave responsibilities attendant upon the exercise of such powers. His duties corresponded to those of an officer of the highest grade in the service of the class to which he belongs.

The learned Assistant Attorney General would ignore this distinction and claims it to be without consequence. We, on the other hand, insist that the change was revolutionary. While an arbitrator to determine cost might be agreed to by the importer, a tax officer to determine values at distant places by official methods should not be appointed having power to affect property rights except the appointment be in compliance with the constitutional provisions governing the appointment of all officers.

H. E. TREMAIN,
MASON W. TYLER,
A. P. KETCHUM,
Of Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1858.

CLEMENT A. AUFFMORDT, JOHN F. Degener, William Degener, and Adolph William Von Kessler, plaintiffs in error,
vs.
EDWARD L. HEDDEN, collector of the port of New York.

No. 72.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

CLEMENT A. AUFFMORDT, JOHN F. Degener, William Degener, and Adolph William Von Kessler, plaintiffs in error,
vs.
EDWARD L. HEDDEN, COLLECTOR of the port of New York.

No. 78.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

The bill of particulars (Rec., p. 5) served in this suit as required by statute, construed with the order made in the United States circuit court, November 23, 1886 (p. 8), limits this case to hat materials—silk, cotton, etc.—imported from Bremen on the steam-ship *Main*, per invoice of February 24, 1886, entered at the custom-house March 13, 1886, the amount of duty alleged as exacted being $533, the date of the payment thereof March 13, 1886. Protest filed and appeal taken April 29, 1886.

The following entry appears (p. 76):

> It was conceded that the excess recoverable, if any, by reason of duty paid on additions to value, was the principal sum of $42 interest $1.
>
> The goods were three cases, marked H. Z. 172, 173, 174.

The value of the invoice as made out in Europe was 6,249 francs 50 centimes, from which deductible charges were taken, 272 francs 30 centimes, leaving the amount 5,977 francs 20 centimes. It is understood that this deducted amount is the francs 272.30 stated (p. 67), as "expenses for paper cases and packing," francs 132.25, and "carriage to shipping port," francs 140.05; and that it is also the same item deducted, page 70. It appears that the importers raised the original invoice value themselves 1,092 francs 80 centimes, making valuation 7,070 francs, as admitted by them, upon which they paid 50 per cent. duty (pp. 33, 35).

The appraisers raised the valuation 440 francs 10 centimes (p. 33), thus making the total valuation 7,510 francs 10 centimes, upon which the additional duty was $42.

The re-appraisal established the same result.

Upon re-appraisement (pp. 69, 70), the total valuation was fixed at 7,510 francs 10 centimes. The additional duty of $42 constitutes the principal sum above conceded to be the amount in controversy. The question is solely one as to increased valuation.

There is, in the bill of exceptions, no color of claim that plaintiffs in error paid any duty whatever upon charges, and the intimations that they may have done so (brief. pp. 2 and 4) is unwarranted.

I.

NO ERROR APPEARS IN RELATION TO THE "REASONABLE WAYS AND MEANS" EMPLOYED BY THE RE-APPRAISERS.

Plaintiffs in error (brief, pp. 9--19) seek to open, re-examine, and try the questions of appraisement involved in this case so as to ascertain whether the appraisers did by "all reasonable ways and means" in their power "ascertain, estimate, and appraise the true and actual market value," etc., and claim that whether they did so, and whether they judged correctly, and whether they succeeded in using all such means, is to be tested and determined in the suit brought under the statute to recover an alleged excess, saying (p. 144):

> But if the "reasonable ways and means" that should attach to the proceedings of these boards shall escape judicial cognizance in an action such as the case at bar, then the procedure of this board will be utterly exempt from judicial correction, for no other case will reach that procedure.

They seek to establish the position (brief, p. 10) that the importer's re-appraisal is a "controversy" or a "case" before a tribunal to determine an issue which consists of an advance of values upon one side made by the original appraisal and the dissent thereto of the importer on the other side; and "that the board" (or tribunal) "is to determine a difference between the importer and the original appraiser as to the dutiable value of the merchandise," and then proceed to argue that having an issue, a "case,"

a "controversy," the proceeding should be tried as a suit, and say (p. 13):

> It requires no argument to establish the absence of "reasonable ways and means" of a tribunal which proceeds to examine any issuable matter under a rule excluding lawyers.

Upon the theory of plaintiffs in error the Government can not, without the consent of the importers, collect its own revenue in the first instance without a full and elaborate trial upon re-appraisal, with attorneys, an issue, witnesses, examinations, cross-examinations, rebuttal, argument, and decision, and furnishing a record to be used after protest as a basis for a trial before a jury, where every point may be retried in all its details and redetermined by the jury.

From the well known conditions of business in the great ports of the country this procedure would not only stop the necessary flow into the national Treasury but it would paralyze business as well. While some lawyers might be benefited and a combination of importers might, in emergencies, be placed in a position to dictate terms to the Government by the methods suggested, it is manifest that such a procedure would be always injurious and sometimes dangerous to the Government.

Although article 474 of the regulations says that the appraisement "should be conducted as an investigation, by experts, to ascertain whether the local appraiser has reported the true and proper market value of the merchandise in question," yet this is to be construed with the other regulations and subject to the statutes.

The controlling statute, as the law existed when the case at bar arose, reads as follows (Rev. Stat., p. 563, sec. 2902):

> It shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector and naval officer, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels, or quantities, and such actual market value or wholesale price of every of them, as the case may require.

By section 2949 it is provided that—

> The Secretary of the Treasury from time to time shall establish such rules and regulations not inconsistent with the laws of the United States to secure a just, faithful, and impartial appraisal of all merchandise imported into the United States, and just and proper entries of such actual market value or wholesale price thereof, and of the square yards, parcels, or other quantities, as the case may require, and of such actual market value or wholesale price of each of them.

It is in the nature of things that the Government must have power to collect its revenue provided by law without liability to hindrance. Such collection is an executive power, and the superintendence thereof is vested in the Secretary of the Treasury.

The statute provides further as follows (p. 524, sec. 2652):

> It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary of the Treasury shall be conclusive and binding upon all officers of the customs.

These and the related statutes show the careful consideration that has been given to the collection of the revenues with promptness and efficiency.

The statutes everywhere show the summary nature which the necessities of the case require, while the case at bar illustrates the tireless efforts of an antagonistic interest to fritter away and render valueless the provisions of these statutes. Now, after all of the contentions that have been made, we are told (Brief, p. 17) that the phrase "all reasonable ways and means" has never been passed upon by this court, and that the constitutionality of the merchant appraiser's office is a new question in the courts, hence both are presented.

As sections 2902 and 2930, which respectively contain these provisions, are both repealed in terms by section 29 of the act of June 10, 1890, it is suggested that the contention, which according to experience must continue, now reaches forward to lay hold of the succeeding statutes.

The two questions above specified and that raised by the sixteenth assignment of error (Brief, p. 8) as to the constitutionality of the provision in section 2930, that "the

appraisement thus determined shall be final, and be deemed to be the true value," are plainly the three principal questions presented by the case at bar. The merchant re-appraiser passes out of existence with the repeal above noted and the general appraiser succeeds him, while section 10 of the act of June 10, 1890, enacts—

> That it shall be the duty of the appraisers of the United States and every of them, and every person who shall act as such appraiser, or of the collector, as the case may be, *by all reasonable ways and means* in his or their power to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost, or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require.

And section 13 of said new act provides that the reappraisal shall be by a board of three of the general appraisers, and that this—

> Board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein.

Hence, it is submitted, one question rests only upon an obsolete enactment, and the others are of consequence mainly because of their being important factors of a statute not in controversy in this case. The slight reference in the bill of exceptions to the requirement to ascertain,

etc., "*by all reasonable ways and means*" indicates that its importance has become apparent since the trial and not that it is a natural outgrowth thereof.

II.

THE REGULATIONS PUT IN EVIDENCE AND THE INSTRUCTIONS OF THE SECRETARY OF THE TREASURY CONTAINED IN THE LETTERS SET FORTH IN THE RECORD, FAIRLY CONSTRUED, DIRECT A JUST, EQUITABLE, AND STATUTORY APPRAISAL, AND NONE OTHER.

Regulation, article 466, page 16, provides that upon the importer's notice, the collector will select a discreet and experienced citizen of the United States, familiar with the character and value of the goods in question, * * * to act as merchant appraiser. The oath of this appraiser (article 468, p. 17) identifies the special importation to be appraised, and pledges him diligently and faithfully to examine, inspect, and report, * * * in conformity with the provisions of the several acts of Congress providing for and regulating the appraisment of imported merchandise.

Under article 469, page 17, the appraisers receive the papers and the samples and packages, and are to "proceed to examine and appraise in the manner pointed out by law." Then the requirement follows:

> The importer or his agent will be allowed to be present and to offer such explanations and statements as may be pertinent to the case.

Regulation 475 presents the statutory rule of appraisal as laid down in section 2902. (*Supra.*)

Under article 1408 (p. 28), the local appraisers must diligently and faithfully examine (as detailed in the oath referred to), and the examination is to embrace the quantity, value, and condition of the goods; and under article 1409 they shall closely inspect, and when they entertain doubts, shall submit samples thereof, with their opinions; they are to exclude unauthorized persons (article 1410) and forbid subordinates to hold communication with interested persons.

Under article 1416 appraisers are, in cases of re-appraisement, to give courteous and due attention to the explanations and statements of importers, in person or by representative, relating to the subject-matter under examination, but are to limit this to one person, and to statements of fact, and are to pursue their inquiry as to dutiable value in such manner as they deem most conducive to a just and equitable determination of the question. "Merchant appraisers appointed in cases of appeal from the decisions of the customs appraisers are also to be governed by this article."

The letter of Mr. Secretary Manning, of June 9, 1885 (p. 29) instructs that—

> The functions of the re-appraising board are the same as those of the original appraisers. *They are themselves to appraise the goods and not to depend for their information upon the appraisement of so-called experts* in the line of the goods in question.

And also (p. 30) that—

> The local appraisers are expected to do their full duty in ascertaining, estimating, and appraising the true and actual market value or wholesale price of

imported merchandise at the time of exportation and in the principal markets of the country whence the same has been imported. When appeals are taken from the valuation so found, it is expected that the general appraiser and merchant appraiser selected to act with him will re-appraise the merchandise in substantially the same manner as is pursued on original appraisement.

In his letter of June 10, 1885 (p. 32) he continues:

> The law (section 2902, Revised Statutes) makes it your duty to ascertain, estimate, and appraise the true and actual market value and wholesale price of the merchandise at the time of exportation and in the principal markets of the country whence the same has been imported into the United States, and when it shall appear that such true and actual market value can not be ascertained to your satisfaction you are to ascertain the cost of production, pursuant to the ninth section of the act of 1883, referred to, and in no case to appraise the goods at less than the cost so ascertained.
>
> These statutes are plain, and the appraising officers must comply with and enforce them.

The laws which Congress has deemed it necessary to make, and has made in the exercise of its power to lay and collect taxes, duties, and imposts, prescribe the rules of procedure. These laws controlled the appraisal under consideration.

Nothing appears in the regulations or in either letter or in the case tending to show that the re-appraiser was not free to perform his duty under his oath and as required by statute.

III.

THE PROCEEDINGS CONNECTED WITH THE RE-APPRAISAL SHOW THAT THE SAME WAS PROPERLY ARRIVED AT AND PERFORMED, AND THAT PLAINTIFFS IN ERROR WERE DENIED NOTHING TO WHICH THEY WERE LEGALLY ENTITLED.

They desired to add 1,092 francs 80 centimes to the invoice, and did so. Upon the increase of 440 francs 10 centimes more they requested re-appraisal and obtained it.

The merchant appraiser was duly appointed (p. 49). The appointment is not in evidence, but it appears that the appointee received the written paper and acted pursuant thereto, and took the oath. (Rec., p. 44–46, and Ex. 4, p. 71.) He acted as such merchant appraiser (pp. 44, 45). The oath became the record. (P. 48, fol. 94.)

This importation was considered by the re-appraisers (Brower and McCreery) in the appraiser's room in the public store. The witness Robinson, who was the representative of the plaintiffs, was notified the day before it occurred that the re-appraisal was to take place. (P. 56.) Upon the appraisement he was called in by the appraisers. (P. 53, fol. 102.)

Merchant Appraiser McCreery had samples of plaintiffs' goods. (Fol. 103, 104.)

Appraiser Brower called on Robinson for his statement of the case.

The statement was made. Then Brower told the representative that he could go. [If upon some former occasion he had been excluded he certainly was not at this time.]

The samples were on the table and the goods were in an adjoining room, where they were generally kept. (P. 54.) No objection was made on plaintiffs' behalf. They were not excluded from their goods. (Fol. 105.) Plaintiffs' representative says, "I was allowed to make a full statement concerning the value of our goods." (Fol. 105.)

No objection of any kind was made (pp. 55, 56), and the evidence fails to show any request made in plaintiffs' behalf that was refused.

It appears that such work is performed rapidly, but rapidity is a necessity, and it is no indication of incorrectness.

The re-appraisal was completed and appears in due form. (Ex. 5, pp. 69, 70.)

The learned judge in the court below in deciding the questions raised by the learned counsel for plaintiffs in error, stated, without challenge, the case in these respects (p. 78) as follows:

> Then as to the other questions raised by the evidence I entertain the same view that I did when the other case was tried on this subject as to everything that was involved in that case—that is, the right of the importer to be present by himself or agent—although the difference between that case and this in that respect is that I do not gather from the testimony of Mr. Robinson, as given here, that he understood that he was in any way excluded from his goods, which were in the adjoining room. I understand him to say that he understands now and understood then in substance that when his appraisal was going on he was at perfect liberty to be in the room where the goods were and point them out to the appraisers, but not to the witnesses. I understood him that there was a notice

on the door that led into that room that nobody would be allowed in there when the witnesses were examining. I understood him to say that he didn't understand but what, when this case was up and the merchant appraiser and the general appraiser were there, if he had wanted to, he could have gone right into the room and pointed out any of the goods he had a mind to. If he testified differently from that I didn't catch the force of it. He was asked to make his statement and understood that he has the right. He didn't question but that the samples they had were the ones, and was told when he got through to go; that the time was out. He staid there as long as he wanted to, to do anything he wanted about pointing out his goods. Now I think the importer was entitled to that—to have him be there when their appraisal was made, to have him point out his goods to know they were his goods, to illustrate them and exhibit them in any manner he saw fit, and present to the appraisers any views he had. I think he had that right, but I am not able to say from this evidence that there is anything tending to show that he was denied that right.

IV.

SELECTION AND ACTS OF THE MERCHANT APPRAISER.

The selection, oath, and manner of appraisal of the merchant appraiser were in accordance with law, and the exceptions in respect thereto (8 Exceptions, pp. 45, 47, 49, and 50) are not well taken.

The manner of the appointment of the merchant appraiser is not illegal.

The written appointment does not appear in the record.

The statute, S. 2930, requires the collector to "select" a discreet and experienced merchant.

The regulations (Rec., p. 16) provide a form of appointment.

The presumption of the law is that the collector performed his duty as required by the statute under which he was acting.

Although the appraiser was sworn in other cases, perhaps, at the same time that he took the oath in this case, yet the oath, which is set forth at page 71, shows that the appraiser was sworn separately and specifically and duly in the case in controversy. That the appraiser may have been selected in other appraisals at the same time, that he may have taken other oaths at the same time, or that he may have had other re-appraisals under consideration during the period covered by the consideration of the Auffmordt importation, can not be material or relevant.

The proposition to show that the appraiser's mind was acting "at the same moment" upon two, or four, or more appraisals (pp. 45, 46) is too extravagant to justify serious argument.

V.

THE CIVIL SERVICE RULES DO NOT APPLY.

The sixth assignment of error and the exceptions appearing on page 52, relate to the civil service law and must rest upon a theory that a merchant appraiser appointed as the emergency arises, upon an importer's request for a re-appraisal, and receiving a per diem compensation, is to be classified under the civil service law and is to be appointed upon a competitive examination.

The appointment of a merchant appraiser does not specifically come under section 6 of the civil service act of 1883. (22 Stat., 405.)

He is not a "clerk," "agent," or "person employed" within the meaning of that section.

Under section 2 the rules are to provide for open competitive examinations * * * for the public service, classified, or to be classified. A merchant appraiser is not in the classified service.

The selecting of merchant experts, who may have occasional and temporary employment in ascertaining the value of merchandise for customs purposes is outside of the scope and purpose of the civil service law.

VI.

THE REPORT OF THE GOVERNMENT EXPERT.

Exhibit No. 14, furnishing the grounds of the tenth assignment of error (pp. 59–61), and being the report of the Government silk expert Schmid to the consul at Horgen upon the importation in question, was properly excluded.

It does not appear that it was used upon either appraisal. If it had been so used no inference would follow that its influence was injurious or material. The first appraisal was superseded in every respect by the second and the second was final. There is no claim of fraud against the re-appraisement.

An attempt to show that the minds of the appraisers were affected by having seen this report is unauthorized.

The office of the report is to advise the Government of the cost of the goods.

No claim is made that the report of Schmid was incorrect but the importers acknowledge the incorrectness of the invoice presented to the consul by increasing it themselves more than one-sixth before calling for the merchandise.

The appraisers are instructed to arrive at their conclusions from their own knowledge and judgment as experts (p. 27). The value of the merchandise is to be arrived at according to law, and as is pointed out by the oath taken (p. 71).

Under Cliquot's champagne (3 Wall. 114) and Fennerstein's champagne (*id.* 145), it would seem probable that such communications are competent and legal evidence upon the question of value.

VII.

DUTIABLE VALUATION.

Plaintiffs in error do not charge fraud or any mistake of fact, or the inclusion of any improper item, or any error respecting classification or rate, but seek by this suit to review the judgment exercised by the experts, their mental action and its result, and to change and re-determine the dutiable value found upon the re-appraisement.

If no right exists to review the conclusions of the board as to dutiable value and substitute therefor the findings of a jury, they have no standing. The effort to make it appear that the re-appraisers may have been influenced by instructions, and the request to have submitted to the

jury the question "whether or no there was any lawful appraisement in this case" (p. 79), and that "to submit all of the testimony to the jury with proper instructions as to what constitutes an appraisement or re-appraisement" (p. 80), and the proposition to determine by the jury what places should be deemed the principal markets of the country of exportation and what should be considered the market value in such country, and what items tended to constitute the wholesale price there (p. 76), and the proposition to place before the jury the depositions and evidence (pp. 73–75) received upon the re-appraisement, are upon the theory that the appraiser's valuation is subject to review and change and reconstruction by the finding of a jury.

That the conclusions arrived at as to dutiable value, by appraisers while acting within the statutes which authorize their appointment, are final and conclusive has been decided many times, and especially in the following leading cases, viz: *Rankin* v. *Hoyt* (4 How., 327, 335), *Marriott* v. *Brune* (9 How., 619), *Bartlett* v. *Kane* (16 How., 263), *Stairs* v. *Peaslee* (18 How., 521), *Belcher* v. *Linn* (24 How., 508), *Hilton* v. *Merritt* (110 U. S., 97), *Oelbermann* v. *Merritt* (123 U. S., 356).

The questions appearing in plaintiff's bill of exceptions are practically analogous to those decided in *Hilton* v. *Merritt* (110 U. S., 97), and it is submitted that most of the legal inquiries here of importance are covered by that decision.

A condensed statement of that case is set forth in the

opinion of *Oelbermann* v. *Merritt* (123 U. S., p. 361) which is as follows:

> It was held by this court, in *Hilton* v. *Merritt* (110 U. S., 97), that the valuation of merchandise made by the customs officers under the statute for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, and that sections 2931 and 3011 of the Revised Statutes, which give the right of appeal to the Secretary of the Treasury when duties are alleged to have been illegally or erroneously exacted and the right of trial by jury in case of adverse decision by the Secretary of the Treasury, do not relate to alleged errors in the appraisement of goods.
>
> In that case there was a re-appraisement by a merchant appraiser, associated with one of the general appraisers, of an invoice of kid gloves, and the collector had thereafter adopted the appraisement returned in an amended report of the general appraiser, and the advance of the invoice value being 16.2 per cent. had imposed an additional duty of 20 per cent. on account of undervaluation in the entry. At the trial the plaintiffs offered to show the foreign market value of the goods. They also offered in evidence the records of the proceedings before the merchant appraiser and the general appraiser, including the testimony and various documents before those officers and subsequently before the collector, and also the testimony of the collector to show all the facts within his knowledge, or officially acted upon by him, in relation to the invoice in question, and to show what his experience was in valuing kid gloves. This evidence was excluded. The plaintiffs also claimed the right to go to the jury upon the questions (1) whether the collector, acting as appraiser, fully and fairly examined the goods; (2) whether the goods

were invoiced at their fair and actual value in the principal markets of France at the time of exportation; (3) whether a fair examination of the goods was made by the general appraiser, associated with the merchant appraiser, when that question was referred to him; (4) whether the facts stated in the protests had been established by the evidence; (5) whether the appraisers followed the evidence before them or disregarded it, and whether the collector disregarded the evidence or was negligent in his appraisal.

This court, in its opinion, stated that the question presented by the plaintiff's exceptions was "whether the valuation of merchandise made by the customs officers under the statutes of the United States for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, or is such valuation reviewable in an action at law brought by the importer to recover back duties paid under protest."

On a consideration of all the sections of the Revised Statutes relating to the subject, embracing 2900, 2902, 2906, 2922, 2929, 2930, 2931, 2949, and 3011, the court came to the conclusion that the meaning of those sections was that the appraisement of the customs officers should be final, but that all other questions relating to the rate and amount of duties might, after the importer has taken the prescribed steps, be reviewed in an action at law brought to recover duties unlawfully exacted; that the valuation made by the customs officers was not open to question in an action at law so long as the officers acted without fraud and "within the power conferred upon them by the statute;" that the evidence offered by the plaintiffs and ruled out by the court "tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were as-

> suming powers not conferred by the statute;" and that the questions which the plaintiffs proposed to submit to the jury were immaterial and irrelevant.

The assignments of error do not present any question like that of substituting a new merchant appraiser for one already duly appointed, as in *Greely* v. *Thompson* (10 How., 225); or that where such appraiser did not see the original packages, only samples drawn some weeks before the appraisal, as in *Greeley's administrator* v. *Burgess* (18 How., 413); or that where it was offered to show that the merchant appraiser was not qualified—was not competent under the statute, as in *Oelbermann* v. *Merritt* (*supra*); or where it was proposed to show that the appraisers did not open, examine, and appraise the packages designated by the collector, as in the same case; or where, to the admitted market value of an importation of oranges properly estimated, there was added such additional value as was equal to a reduction made from the claimed value of the cases covering the goods, as was the case in *Badger* v. *Cusimano* (130 U. S., 39).

In these and similar cases the element of error arises outside of the valuation itself, and outside of the appraisement made as prescribed by statute.

Hence the rule stands as stated in *Hilton* v. *Merritt*, where the court said:

> We are of opinion, therefore, that the valuation made by the customs officers was not open to question in an action at law as long as the officers acted without fraud and within the power conferred on them by statute.

In *Oelbermann* v. *Merritt* and *Badger* v. *Cusimano* the court adhere to their decision in *Hilton* v. *Merritt*..

VIII.

THE APPOINTMENT OF THE MERCHANT APPRAISER WAS NOT IN CONTRAVENTION OF THE CONSTITUTION.

The question is presented under the fourteenth assignment of error, and Record (page 79), as to the constitutionality of the merchant appraiser. It is claimed that such appointment is void under the second subdivision of article 2, of section 2, of the Constitution, which reads:

> The Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments.

Plaintiffs in error claim that the merchant appraiser is an inferior officer under this clause.

It is submitted:

That the merchant appraiser is not an officer of the United States required to be appointed by the President, a court of law, or a head of a Department. The nature of the employment and the well-known exigencies of the customs service are proofs of this position.

He may be properly held to be "an agent or employé working for the Government and paid by it, as nine-tenths of the persons rendering service to the Government undoubtedly are without thereby becoming officers."

The constitutional provision does not require a construction that shall be exclusive in its nature.

Congress is not excluded from providing necessary assistants, agents, commissioners, or experts in any proper case.

Much elaboration may be made of the ambiguities of the words "office" and "officer," and extended arguments may be submitted as to the various uses of the words and as to the definitions thereof, but such elaboration and definitions are without instruction.

The ambiguities that have grown out of, or that may be developed from, the words "office" and "officer" are very learnedly presented in the brief for plaintiffs in error, pages 20 to 48.

That Congress might have provided that this appraiser should have been constituted an officer in the constitutional sense is unquestioned; that no such provision was made is equally clear.

In *United States* v. *Mouat* (124 U. S., 303), it is held that a paymaster's clerk in the Navy is not an officer within the meaning of the act of June 30, 1876, 19 Statutes, 65, while in the succeeding case of *United States* v. *Hendee* (*id.* 309) it is held that a paymaster's clerk in the Navy is an officer within the meaning of 22 Statutes, 473, the difference resting not upon the constitutional requirement or the nature of the service, but upon the fact that Congress intended to use the word in one sense in one case and in another sense in the other case. The construction of the word is to be in accordance with the meaning of Congress.

The position and action of the merchant appraiser in the machinery for the collection of duties is well understood. Primarily it is for the collector to estimate the

amount of dues payable upon imported merchandise and to receive the duties, and the merchant appraiser is, when the proper case arises, his helper, his expert assistant, an executive agent, in ascertaining value under the statutes. The collector needs to know immediately, in order to complete his duty in relation to certain imports then on view, their actual wholesale market value at a time and in the principal markets of a country specified.

It is not in human nature that one man can decide correctly as to the value of many of the numberless articles imported. Information must be obtained of their value. In one contingency the expert to furnish the information in a practical way has been the merchant appraiser.

His principal qualifications were his special knowledge as an expert as to the thing to be valued under the conditions presented, and his freedom from interest in relation to the valuation.

The valuation is but one element of the obtaining of revenue from imports; this appraiser, so far as his work goes, is the representative of the collector; the appointment comes from, the oath is taken before, and the report runs to the collector, whose further action continues therefrom.

Section 2930 (repealed by section 29 of the act of June 10, 1890) provides, so far as applicable in this case, that on receipt of notice of dissatisfaction from the importer the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers, etc.

When thus selected this appraiser is notified of his ap-

pointment and of the time and place of the re-examination (Rec., p. 16). He takes an oath to perform this specific appraisal (pp. 16, 71). He is paid per day for his services, whether employed in one case or many (pp. 18, 51).

The person selected has no right to be designated; he may be required to act upon several cases in a day, or a long period may pass without his being called upon.

A man may be called upon to act only once in a lifetime. The statute does not use the word "appoint." The position is without tenure, duration, continuing emolument, or continuous duties; it is at most occasional and temporary.

Such a position is not an office and such an assistant is not an officer under the requirements of the clause of the Constitution under consideration.

The *United States* v. *Germaine* (99 U. S., 508) presented the question whether a civil surgeon, appointed by the Commissioner of Pensions, was an officer under this section of the Constitution.

The court referrred to the case of the *United States* v. *Hartwell*, and said:

> If we look to the nature of defendant's employment we think it equally clear that he is not an officer. In that case the court said the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner, or claim-

ant of a pension, presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

No regular appropriation is made to pay his compensation, which is $2 for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district under regulations to be prescribed by the Commissioner. He is but an agent of the Commissioner, appointed by him and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to $5 or $500 per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the Commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

The merchant appraiser is not an "inferior officer" under clause 2, and his selection is not in violation of the Constitution. (*United States* v. *Hartwell*, 6 Wall., 385; *United States* v. *Germaine*, 99 U. S., 508; *United States* v. *Mouat*, 124 U. S., 303; *United States* v. *Smith*, 124 *id.*, 525.)

IX.

THE PROVISIONS MAKING THE APPRAISEMENT DETERMINED UNDER REVISED STATUTES, SECTION 2930, FINAL IS NOT UNCONSTITUTIONAL.

Plaintiffs' counsel upon the trial requested the court to submit all evidence touching the value upon which the duty was assessed, and the value declared on entry, to the jury on the ground that section 2930 is unconstitutional; and claimed that Article VII of amendments of the Constitution gives the right to submit any and every question touching the imposition of duty to the jury; and that by the withholding of evidence from the jury by virtue of this section which declares re appraisers' conclusions final plaintiffs are deprived of their constitutional right of trial by jury to which they are entitled by virtue of such article. (Rec., p. 80.)

The article is as follows:

ARTICLE VII.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

The section of the Revised Statutes under which this action is brought is:

> SEC. 3011. Any person who shall have made payment under protest, and in order to obtain possession

> of merchandise imported for him, to any collector, or person acting as collector, of any money as duties when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid.

Importers are not denied their action at law or their trial by jury, as both are authorized, substituting the exclusive statutory authority for the common law privilege. (*Arnson* v. *Murphy*, 109 U. S., 238.)

But here the importer seeks to go further; he seeks, in his private interest, to annul the action of Congress and overrule the direction of the court.

(*a*) This action is, to all intents and purposes, a suit against the Government for moneys held in its Treasury.

The Government is not suable except by its own permission. In granting permission to maintain this action it attaches the condition that the valuation found by the appraisers upon this re-appraisement initiated by the importer shall be treated as final.

The provision is in effect in the nature of a rule of evidence that the finding upon re-appraisement as to the dutiable value shall be conclusive evidence of such value.

The plaintiffs in their request (p. 34) ask that the goods "may be re-appraised pursuant to law;" the law they invoke withholds the power to disintegrate the old valuation and establish a new one. They obtained the appraisal they asked for; they may not now repudiate it because dissatisfied with its result.

(*b*) It is not proper to construe this article without due

regard to other provisions of the Constitution. Section VIII of Article I declares that Congress shall have power to lay and collect taxes, duties, imposts, and excises; * * * and to make all laws which shall be necessary and proper for carrying into execution, and so forth.

It is established law that where the power is given to Congress, it must judge of the means necessary to effect the end. In the *Metropolitan Bank* v. *Van Dyck*, the court of appeals of the State of New York, (27 N. Y. p. 445) say:

> We find, therefore, the law to be settled that where the power is given to Congress to do a particular thing, the means necessary and proper for its execution are also delegated, and that Congress alone is the judge of the means most proper to be selected to aid in the execution of the power.

Chief-Justice Marshall, in *McCulloch* v. *State of Maryland* (4 Wheat, 316, 409), says:

> The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The same principles are enunciated in *United States* v. *Marigold* (9 Howard, 560).

It therefore follows that Congress, having power to lay and collect taxes and duties and to make all laws which shall be necessary and proper for carrying such powers into execution, and having the right (within the limits of

its legitimate action) to judge of the means necessary to effect the end, must be held to possess the power, in establishing its system for the collection of customs duties, to enact that the re-appraisal permitted by section 2930 shall be final as to valuation.

(*c*) Were there a conflict of powers or rights presented that construction which insures the means to carry on the Government and meet its obligations should overbear the minor one of the method of determining dutiable value.

(*d*) Further, it will be noticed that the claim of right to retry the valuation by a jury is not designated or specified in the Constitution or in any law; it is a deduction, an inference only, and has never had the sanction of a statute or a decision.

(*e*) Further than this, the law has existed for a long period as it now is, and almost without challenge. The uniform course of legislation and practice attended by business and legal acquiescence for a long time, and where great numbers of instances have arisen and very large amounts of money have been involved, should have great weight.

(*f*) To show that Congress still adheres to its assertion of right to make this appraisal final, it may be noted that the act of June 10, 1890, which establishes a new method of re-appraisal and of review, provides in section 13 that the decision of the board of appraisers, "or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein," and the proceedings for review in the circuit court and appeal to the Supreme Court are limited to question of classification and rate.

The importance and indeed the practical necessity of the exercise on the part of the Government of measures that the importer may deem severe is aptly stated by this court in *Cheatham* v. *United States* (92 U. S., 88), as follows:

> All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes and to be rigid in the enforcement of them. These measures are not judicial; nor does the Government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country this system for each State or for the Federal Government provides safeguards of its own against mistake, injustice, or oppression in the administration of its revenue laws. Such appeals are allowed to specified tribunals as the law-makers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects the United States have, as was said by this court in *Nichols* v. *United States* (7 Wall., 122), enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury, and, if dissatisfied with this highest decision of the executive department of Government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the Government through its collector, and test in the courts the validity of the tax.
>
> * * * * *

It will be readily conceded from what we have here stated that the Government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.

If there existed in the courts, State or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the Government might be placed in the power of a hostile judiciary. *Dows* v. *The City of Chicago* (11 Wall., 108.)

X.

THE LEGISLATION OF CONGRESS, THE PRACTICE OF THE OFFICERS OF THE GOVERNMENT, AND LONG PUBLIC ACQUIESCENCE HAVE PRACTICALLY ESTABLISHED THE RIGHT OF THE COLLECTOR TO APPOINT THE MERCHANT APPRAISER; AND ALSO, THE CONCLUSIVE EFFECT OF THE APPRAISAL.

By section 5 of act of July, 1789 (1 Stat., pages 36, 37), it is made a duty of the collector to receive the invoices of imported goods and "to estimate the duties payable thereon, and to indorse the same on each entry; to receive all moneys paid for duties," and "to employ proper persons as weighers, gaugers, measurers, and inspectors at the several ports within his district, * * * and to perform all other duties which shall be assigned to him by law."

He is to provide the necessary store-houses, scales, weights, and measures, with the approbation of the principal officer of the Treasury Department, but such approbation, it is evident from the phraseology, is not contemplated as to said appointments.

Section 22 of the same act provides that where the goods are not invoiced (as required) the omission being with design to defraud the revenue, the goods shall be forfeited, and in such case, and where the collector is suspicious of fraud as to the valuation, he shall take the goods and the value shall be ascertained by two reputable merchants mutually chosen by the collector and the owner or consignee.

By section 21 of tariff act of March 2, 1799 (1 Stat., page 642), the employment of the weighers, gaugers, measurers, and inspectors is to be with the approbation of the principal officer of the Treasury Department.

By section 52 of same act, page 666, when entry is incomplete or when goods have been damaged during the voyage, an appraisement may be had by merchants, one of whom shall be appointed by the collector and the other by the owner, importer, or consignee, the appraisal to be subscribed by the appraisers and verified by oath before the collector.

By section 66 of the same act, page 677, a similar appraisal as to suspected goods is authorized, with a provision that in case of prosecution for forfeiture the appraisement shall not exclude other proof of cost.

Section 9 of act of April 20, 1818, (3 Stats. 436) directs the appointment by the President of two appraisers at each of five named ports, to examine goods and report their value, having associated with them a merchant to be named by the importer.

Upon appraisements in ports other than those named two respectable resident merchants selected by the col-

lector, together with a respectable resident merchant chosen by the party in interest * * * shall be the appraisers.

> *Provided*, That in any case where the party in interest shall decline or neglect to choose a respectable resident merchant to join in such appraisement, the collector shall make the selection necessary to the due execution of this act, and the appraisement so made by them, or a majority of them, shall be valid and effectual in law.

Section 16 of act of March 1, 1823 (3 Stats., 735) directs the appointment of two appraisers in each of seven principal ports, and when appraisement is to be made at ports other than those named the collector shall appoint two respectable resident merchants who * * * shall be the appraisers.

By section 17 the merchant appraisers are to receive $5 per diem each, while actually employed.

Section 18 of said act is as follows:

> *And be it further enacted*, That in all cases where the owner, consignee, importer, or agent shall be dissatisfied with the appraisement of any goods, wares, or merchandise, made by the appraisers appointed under the sixteenth section of this act, it shall be lawful for him to employ, at his own expense, two respectable resident merchants, who, after being duly qualified according to the sixteenth section of this act, shall, together with the two appraisers appointed on the part of the United States, under this act, examine and inspect the goods, wares, or merchandise in question; and after such examination and inspection they shall report the value thereof, if they agree therein, and, if not, the circumstances of their disagreement

to the collector; and in case such owner, consignee, importer, or agent shall be dissatisfied with such report and second appraisement, it shall be lawful for him to refer the case to the Secretary of the Treasury, who shall be, and is hereby, authorized and empowered to decide thereon, or to require further testimony in the case in such manner as he may deem proper, and to order the said goods, wares, or merchandise to be entered accordingly.

By section 8 of act of May 19 1828 (4 Stats., 273), it is enacted that in all cases of imposition of any ad valorem rate of duty, etc., it shall be the duty of the collector to cause the value thereof to be appraised, estimated, and ascertained.

And it shall, in every case, be the duty of the appraisers of the United States, and of every of them, and of every other person who shall act as such appraiser, by all the reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual value, any invoice or affidavit thereto to the contrary notwithstanding, etc.

Section 2 of act of May 28, 1830 (4 Stats., 409), directs that—

If the collector shall deem any appraisement of goods too low he shall have power to order a re-appraisement either by the principal appraisers or by three merchants designated by him for that purpose, who shall be citizens of the United States, and cause the duties to be charged accordingly.

Section 8 of act of July 14, 1832 (4 Stats., 592), enacts that the appraisers may call before them and examine upon oath any owner, importer, consignee, or other person as to the true value of any merchandise imported, and require

letters, accounts, or invoices. And if any person so called shall fail to attend, or shall decline to answer or to produce such papers, he shall forfeit $50.

> And if such person be the owner, importer, or consignee, the appraisement which the said appraisers shall make of the goods, wares, or merchandise shall be final and conclusive, any act of Congress to the contrary notwithstanding.

Section 16 of act of August 30, 1842 (5 Stats., 563), makes it the duty of the collector to cause the actual market value or wholesale price thereof at the time when purchased * * * to be appraised, estimated, and ascertained, and further provides:

> And it shall, in every case, be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector and naval officer, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the said goods, wares, and merchandise at the time purchased and in the principal markets of the country whence the same shall have been imported into the United States.

Section 17 of said act (page 264) provides for the examination of witnesses and the production of letters, accounts, and invoices, and a person failing or refusing compliance shall be subject to forfeit and pay to the United States $100:

> And if such person be the owner, importer, or consignee the appraisement which the said appraisers, or

> collector and naval officer, when there are no legal appraisers, may make of the goods, wares, and merchandise shall be final and conclusive, any act of Congress to the contrary notwithstanding.

This section also provides for notice to the collector by a dissatisfied importer:

> On the receipt of which, the collector shall select two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same agreeably to the foregoing provisions; and if they shall disagree the collector shall decide between them, and the appraisement thus determined shall be final and deemed and taken to be the true value of said goods, and the duties shall be levied thereon accordingly, any act of Congress to the contrary notwithstanding.

The omission of the final clause of this quotation has not changed the meaning of the enactment.

The foregoing rules finally crystallized as above shown have remained without material change upon the points now under consideration from 1842 until the present time.

This court has had frequent occasion to consider cases involving the work of the merchant appraiser and those where the clause making the re-appraisal final might have been presented.

It does not appear that the question has been suggested before, that the appointment of this appraiser otherwise than by the President, the courts of law, or the heads of Departments is in violation of the Constitution; or that the clause making re-appraisal final as to valuation is subject to constitutional objection.

It is respectfully submitted that legislation, practice, and acquiescence have practically and firmly established the construction here contended for in behalf of defendant in error, and that the rule laid down in the following cases is applicable in this case. (*Stuart* v. *Laird*, 1 Cranch, 308; *Martin* v. *Hunter's Lessee*, 1 Wheat., 304, 349–352; *Cohens* v. *Virginia*, 6 Wheat., 264, 418–421; *Cooley* v. *Board of Wardens, etc.*, 12 How., 299, 315–318; *Lithographic Co.* v. *Sarony*, 111 U. S., 53, 57; *The Laura*, 114 U. S., 411, 415–16.)

It is submitted that the judgment should be affirmed.

A. X. PARKER,
Assistant Attorney-General.